IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-599

APPALACHIAN POWER COMPANY,

Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF APPEALS OF THE STATE OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

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October 21, 1975

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JURISDICTIONAL STATEMENT

Appalachian Power Company ("Appellant" or "Appalachian") appeals from orders of the Supreme Court of Appeals of West Virginia ("West Virginia Court") entered June 23, 1975 and July 29, 1975 upholding certain orders of The Public Service Commission of West Virginia ("Commission"). Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and should exercise its jurisdiction to determine the substantial questions presented.

Opinion Below

The order of the West Virginia Court entered June 23, 1975 and its denial of rehearing by order entered July 29, 1975 are not reported and no opinion was issued. The orders of the Commission upheld by the West Virginia Court were issued September 16, 1974, October 18, 1974, January 31, 1975, February 14, 1975

and March 21, 1975 in the Commission's Case No. 7083 and are not reported. A copy of each order is included in the separate Appendix.

Jurisdiction

This suit was brought to review orders of the Commission with respect to rates charged to Appalachian's retail utility customers.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2) to review by appeal a final judgment rendered on June 23, 1975 by the Supreme Court of Appeals of West Virginia, the highest court of that State in which a decision could be had, before which court there was drawn in question the validity of certain statutes of West Virginia on the ground of their being repugnant to the Constitution of the United States, and the decision of the West Virginia Court on June 23, 1975 was in favor of the statutes' validity. Appellant's motion for reconsideration and petition for rehearing which drew in question a further statute of West Virginia on the ground of such repugnance was denied by the West Virginia Court on July 29, 1975.

The statutes upheld by the West Virginia Court which are the subject of this appeal are: the Commission's order of September 16, 1974, as affirmed by its orders of October 18, 1974, February 14, 1975 and March 21, 1975; the Commission's order of January 31, 1975, as modified and affirmed by its orders of February 14, 1975 and March 21, 1975; and West Virginia Code, Chapter 24, Article 5, Section 1.

The Commission's order of January 31, 1975 was issued under West Virginia Code, Chapter 24, Article 2, Sections 3 and 4. Appellant's petitions for rehearing before the Commission and the Commission's order of

March 21, 1975 modifying and affirming its order of January 31, 1975 were filed and issued under West Virginia Code, Chapter 24, Article 1, Section 7, and Rule 19 of the Rules of Practice and Procedure of the Commission.

The proceeding before the West Virginia Court was brought pursuant to West Virginia Code, Chapter 24, Article 5, Section 1, which provides for review by that court of final orders of the Commission. Appellant's motion for reconsideration and petition for rehearing before the West Virginia Court was brought pursuant to that court's Rule XIII.

Appellant filed Notices of Appeal with the Clerk of the West Virginia Court on June 30, 1975 and October 14, 1975, and filed separate Notices of Appeal with the Commission on July 2, 1975 and October 14, 1975.

A copy of each order, West Virginia statute, rule and notice of appeal referred to above is set forth in the separate Appendix.

The following decisions sustain jurisdiction by appeal because the Commission's orders are "statutes" within the purview of 28 U.S.C. §1257(2): *Atchison, Topeka & Santa Fe Ry.* v. *Public Utilities Commission of California*, 346 U.S. 346, 348 (1953); *Bluefield Water Works & Improvement Company* v. *Public Service Commission of West Virginia*, 262 U.S. 679, 683 (1923); *Lake Erie & Western R.R.* v. *State Public Utilities Commission of Illinois*, 249 U.S. 422, 424 (1919); and *Grand Trunk Western Ry.* v. *Railroad Commission of Indiana*, 221 U.S. 400, 403 (1911).

The following decisions further sustain jurisdiction by appeal on the basis that the June 23, 1975 order of the

West Virginia Court, as upheld by its order of July 29, 1975, was a "final judgment" of the highest court of the state in which a decision could be had and a "decision" in favor of the validity of the statutes drawn in question: *Atchison, Topeka & Santa Fe Ry.* v. *Public Utilities Commission of California, supra,* p. 349; and *Napa Valley Electric Company* v. *Railroad Commission of California,* 251 U.S. 366, 372 (1920).

In the event that the West Virginia Court order of June 23, 1975, as upheld by its order of July 29, 1975, is construed as not being a "final judgment" or as not being a "decision" in favor of the statutes' validity within the meaning of 28 U.S.C. §1257(2), jurisdiction of this Court is invoked alternatively pursuant to 28 U.S.C. §1257(2) to review by direct appeal the final orders of the Commission rendered on October 18, 1974, February 14, 1975 and March 21, 1975.[1] In rendering these orders, the Commission acted in its quasi-judicial capacity by reviewing Appellant's petitions for rehearing and was therefore the highest court of the state in which a decision could be had. In such capacity the Commission rendered its "decisions" in favor of the validity of the September 16, 1974 and January 31, 1975 orders which are "statutes" drawn in question on the ground of their repugnance to the Constitution of the United States. See *Prentis* v. *Atlantic Coast Line,* 211 U.S. 210, 224-226 (1908), which recognizes that a state public utilities commission may be a "court" within the meaning of federal statutory provisions, and *Atlantic Greyhound Corporation* v. *Public Service Commission*

[1] *Nash* v. *Florida Industrial Commission,* 389 U.S. 235, 237 (1967). Docketing an appeal from the Commission's orders is timely made because the 90-day period commences at the same time as an appeal from the order of the West Virginia Court. No appeal could be taken prior to that date because the orders of the Commission were susceptible of being reviewed and reversed until that court had acted. See *Andrews* v. *Virginian Ry.*, 248 U.S. 272, 275 (1919).

of West Virginia, 132 W. Va. 650, 659, 54 S.E.2d 169, 174 (1949), which recognizes that the Commission possesses quasi-judicial powers.

It is intended that appeal is taken pursuant to the Notice of Appeal filed with the West Virginia Court on October 14, 1975. In the event that such Notice of Appeal is deemed not timely filed,[2] Appalachian appeals pursuant to its Notice of Appeal filed June 30, 1975 with the West Virginia Court.

In the event that appeal is not considered the proper mode of review, Appellant requests that the papers upon which this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §2103.

Questions Presented

(1) Whether it is consistent with due process of law, under the Fourteenth Amendment to the Constitution of the United States, to deny Appalachian an opportunity to present evidence and have an adjudication upon its claim that the Commission's January 31, 1975 order is repugnant to the Fifth and Fourteenth Amendments to the Constitution of the United States in that the rates for electric service established by the Commission, and the more than $23 million of refunds ordered by the

[2] Appellant's Notice of Appeal filed October 14, 1975 was within 90 days of the West Virginia Court's denial of Appellant's motion for reconsideration and petition for rehearing on July 29, 1975. The timely petition for rehearing delayed the running of the 90-day period from the West Virginia Court's June 23, 1975 order because it operated to suspend the finality of that order until June 29, 1975. *Department of Banking of Nebraska* v. *Pink,* 317 U.S. 264, 266 (1942). However, see page 14, n. 22 and accompanying text *infra* for possible interpretation that Appellant's motion for reconsideration and petition for rehearing was not timely filed and therefore would not delay the running of the 90-day period.

Commission for the period July 29, 1971 through December 31, 1973, are confiscatory and deprive Appalachian of its property without just compensation and without due process of law?

(2) Whether, without permitting Appalachian an opportunity to present evidence of the actual financial results of its operations for the period July 29, 1971 through December 31, 1973, it is permissible under the doctrines of fair play and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States for the Commission to compel Appalachian to establish rates for electric service for such period and to refund more than $23 million to its customers in light of the procedural infirmities of this case which include, but are not limited to, reliance upon evidence of a period more than four years old at the time of the Commission's action?

(3) Whether it is consistent with due process and a fair hearing guaranteed by the Fourteenth Amendment to the Constitution of the United States for the Commission to permit an attorney to serve as Commission Staff counsel and as the sole signer of the Commission Staff brief, who, earlier in this same proceeding, had actively participated as counsel for an intervenor opposing Appalachian's proposed rates and had presented exhibits on behalf of such intervenor?

(4) Whether the Commission's order of September 16, 1974, which ordered Appalachian to "cease and desist its practice of 'repricing' coal purchased from affiliated interests for inclusion in the Fuel Adjustment Clause, . . ." is void and of no force and effect because it was issued without affording to Appalachian notice or opportunity to be heard, and without any supporting evidence in the record, in violation of basic constitutional principles of due process?

(5) Whether West Virginia Code, Chapter 24, Article 5, Section 1, as construed and applied in this case by the West Virginia Court to deny Appalachian a judicial hearing on its constitutional challenge to the Commission's rate orders, is repugnant to the Fifth and Fourteenth Amendments to the Constitution of the United States and therefore void?

Statement

Appalachian is a wholly-owned subsidiary of American Electric Power Company, Inc. engaged in the production, transmission and distribution of electric energy in West Virginia and Virginia. The rates which Appalachian charges its retail customers situated in West Virginia, and the terms and conditions of service affecting those customers, are regulated by the Commission.

Appalachian filed with the Commission on February 22, 1971 tariff schedules based upon a calendar year 1970 test period which increased rates by approximately 10.5% on an annual basis. The increased rates became effective on July 29, 1971 under bond and subject to refund. Hearings scheduled by the Commission concerning the reasonableness of these rates did not commence until April, 1973; the hearings were completed in December, 1973. On January 31, 1975, forty-seven months after Appalachian filed its rates, the Commission disallowed all but 14% of the requested rate increase, directed Appalachian to file new tariff schedules which would reflect the level of rates which the Commission found appropriate based on the 1970 test year, and ordered refunds to customers for amounts collected in excess of such level during the period since July 29, 1971.

The Commission's January 31, 1975 order, which was

issued nearly four years after the 1971 rate filing, acknowledged that the determination was made upon "a stale record"[1] and that "[t]wo of the three Commissioners who heard parts of the evidentiary record have since resigned from the Commission."[2] The Commission further stated:

> "In the event that this decision and order is unduly harsh to Appalachian Power Company because of events of late 1971 through 1974, so as to be contrary to the best interests of Appalachian's customers, the utility has available to it one of several alternate modes of relief available under our controlling statutes and regulations to spread the facts of the lag period upon the record." (Appendix, p. 18.)

Accordingly, Appalachian sought an opportunity to present evidence of its actual operating results in review proceedings before both the Commission and the West Virginia Court.

On February 7, 1975, Appalachian petitioned the Commission for rehearing with respect to its order of January 31, 1975. First, Appalachian alleged in its petition that the rates set by that order were "confiscatory,"[3] that the end result of the order "is at total variance with fundamental constitutional standards of a fair rate of return,"[4] citing *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), and that results actually achieved through collections of revenue under bond for the period from July 29, 1971 "were not inconsistent with the fundamental constitutional criteria

[1] Appendix, p. 16.

[2] Appendix, p. 13.

[3] Petition of February 7, 1975 at p. 6. As a direct consequence of the January 31 order, Moody's Investors Services, Inc. on February 4 reduced Appalachian's mortgage bond rating from A to Baa and its debenture rating from Baa to Ba and on February 20 reduced Appalachian's commercial paper rating from Prime 2 to Prime 3. On April 10, 1975, when Appalachian was seeking to market additional bonds, Standard and Poor's reduced its rating on Appalachian's bonds from A to BBB and on the debentures from BBB to BB.

[4] *Id.* at p. 3.

set forth in the *Hope* case."[5] Second, in its memorandum accompanying the February 7th petition, upon citation to *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio (No. 2)*, 294 U.S. 79 (1935), which states on page 81 that " 'the rudiments of fair play' " are "made necessary" by the Fourteenth Amendment, Appalachian urged that "prior to ordering refunds, a regulatory body must examine the Company's actual experience during the refund period,"[6] and in both the petition and the memorandum Appalachian asserted its right to present evidence of such actual results at a rehearing and offered to present such evidence. Third, consistent with such requirements of due process and fair play, Appalachian further alleged that the Commission erred in rendering a decision which adopts conclusions from a Commission Staff brief signed solely by attorney McDonald, who previously had participated in the same proceeding by presenting exhibits and serving as counsel for a group opposing Appalachian's requested rate relief.[7] Fourth, Appalachian challenged the Commission's order of September 16, 1974 as having been rendered without notice and opportunity to be heard, and "without any evidence to support it in the record of this proceeding."[8]

On February 14, 1975, the Commission issued its interim order in response to Appalachian's February 7th petition. Among other things, this order scheduled oral argument with respect to: first, Appalachian's assertion that the approved rate levels were confiscatory as applied for the period from July 29, 1971; second, whether the record should be reopened to receive evidence of the actual results for the period commencing

[5] *Id.* at p. 6.

[6] Memorandum of February 13, 1975 at p. 2.

[7] Petition of February 7, 1975 at p. 4.

[8] *Ibid.*

July 29, 1971; and third, the impropriety of attorney McDonald's dual role in the case. The order also denied further consideration of the Commission's September 16, 1974 order.

On March 21, 1975, after completion of oral argument ordered on February 14, 1975, the Commission recognized "Appalachian's right to minimize its obligation to make refunds in excess of [authorized] collections made on and after January 1, 1974" and ordered that Appalachian be allowed to introduce evidence of its actual earnings experience for the period January 1, 1974 through March 31, 1975.[11] However, the Commission refused to recognize this right for the period July 29, 1971 through December 31, 1973 and denied Appalachian any opportunity to present evidence of its actual results for that portion of the refund period. The order stated with respect to the attorney McDonald issue that "[t]he ground for alleged error is entirely rejected by the Commission as without basis in law or fact or as a breach of ethics."[12] The Commission also confirmed its October 18, 1974 and February 14, 1975 denials of further consideration of its September 16, 1974 order. In conclusion, the Commission directed Appalachian to file new tariff schedules and to make refunds in accord with its order of January 31, 1975 for that portion of the refund period extending from July 29, 1971 through December 31, 1973.

Thus, the Commission's order of March 21, 1975, to the extent that it confirmed its September 16, 1974 and January 31, 1975 orders, was a decision in favor of the

[11] Appendix, pp. 67-68.

[12] Appendix, p. 68.

validity of such orders and against each of Appalachian's claims based upon repugnance to the Constitution of the United States as set forth herein and in Appalachian's petition to the Commission of February 7, 1975.

On April 7, 1975, Appalachian filed its petition with the West Virginia Court seeking review of the orders of the Commission dated September 16, 1974 and January 31, 1975. The petition and its accompanying note of argument renewed the constitutional claims asserted before the Commission: first, by stating that the " 'end result' of the Commission's orders deprives Petitioner of its property without due process and just compensation,"[13] and that "[t]he rate levels established by the Commission's order, based on 1970 data, are unconstitutional at least as applied to Appalachian's 1972 and 1973 operations,"[14] citing *Federal Power Commission* v. *Hope Natural Gas Co., supra,* and *Bluefield Water Works Improvement Company* v. *Public Service Commission of West Virginia, supra;* second, by stating that the Commission erred in ordering Appalachian "to refund monies collected between July 29, 1971, and December 31, 1973, without permitting Appalachian to introduce evidence as to its actual results during that period," citing *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio (No. 2), supra;*[15] third, by questioning whether the dual participation of attorney McDonald requires "a rehearing before the Commission in order to remove the appearance of prejudicial taint arising from the attorney's dual representation in the

[13] Petition of April 7, 1975 at p. 6.

[14] Note of Argument of April 7, 1975 at p. 11.

[15] Note of Argument of April 7, 1975 at pp. 1 and 5.

same administrative proceeding";[16] and fourth, by asserting that "[t]he Commission's arbitrary and unjust issuance of the [September 16, 1974] order without the required notice and hearing deprived Appalachian of the most fundamental Constitutional rights and, for that reason, the Commission's order is void."[17]

On June 23, 1975, the West Virginia Court made and entered an order that in its opinion Appalachian had "not shown itself entitled to the relief prayed for in its said petition," and "that the prayer of the petition for an appeal from, suspension and review, in this proceeding, be, and the same is hereby, denied."[18] Though no reference was made by the court to the federal questions duly raised before it,[19] it is clear that the West Virginia Court's decision of June 23, 1975 was a decision in

[16]Note of Argument of April 7, 1975 at p. 2.

[17]Note of Argument of April 7, 1975 at p. 18.

[18]Appendix, p. 72.

[19]Any question with regard to duly raising the federal questions before the West Virginia Court is resolved by referring to the "Statement of the Respondent, Public Service Commission of West Virginia, of its Reasons for the Entry of its Orders of September 16, 1974, October 18, 1974, January 31, 1975, February 14, 1975 and March 21, 1975, in Case No. 7083," which was dated April 22, 1975 and filed with the West Virginia Court in response to Appalachian's April 7, 1975 petition.

First, the Statement reads: "The end result of the Commission's orders does not unconstitutionally confiscate Appalachian's property for the period July 29, 1971 to December 31, 1973." p. 16.

Second, in its response to Appalachian's demand to have an opportunity to present actual operating results, the Statement proposes that the Commission's independent examination of Appalachian's coverage levels satisfied "the constitutional tests of the *Hope* and *Bluefield* cases . . ." p. 13.

Third, though not specifically referring to the United States Constitution, the Statement finds at p. 23 no impropriety in attorney McDonald's conduct under Canon 9 of the Code of Professional Responsibility which, consistent with the requirements of due process, dictates that "a lawyer should avoid even the appearance of professional impropriety."

Fourth, the Statement asserts that the September 16 and October 18, 1974 orders of the Commission "did not unconstitutionally deprive Appalachian of its property without due process of law." p. 24.

favor of the validity of the Commission's order of September 16, 1974, as affirmed, and its order of January 31, 1975, as amended and affirmed, within the meaning of 28 U.S.C. §1257(2). *Atchison, Topeka & Santa Fe Ry.* v. *Public Utilities Commission of California, supra,* p. 349; and *Napa Valley Electric Company* v. *Railroad Commission of California, supra,* p. 372.

Thereafter, Appalachian filed its Notices of Appeal to the Supreme Court of the United States with the West Virginia Court on June 30, 1975 and with the Commission on July 2, 1975. Appalachian also filed with the Commission, under protest and in compliance with paragraph 2 of its order of January 31, 1975, as amended, revised tariff sheets for the period July 29, 1971 through December 31, 1973.

On July 23, 1975, Appalachian filed with the West Virginia Court its motion for reconsideration and petition for rehearing of that court's order of June 23, 1975. Appalachian's motion, as amended on July 29, 1975, raised the fifth federal question brought in this appeal by alleging that the West Virginia Court had:

> "erred in its Order of June 23, 1975, in that, by denying Appalachian's clear right to present evidence in a judicial forum supporting its claim that rates established by the Commission under its Order of January 31, 1975, are confiscatory and that refunds ordered thereunder are unlawful, this Court denied Appalachian the minimum standards for due process set forth in the constitutions and laws of the State of West Virginia and the United States of America, and construed and applied West Virginia Code Chapter 24, Article 5, Section 1 in a manner repugnant to the fourteenth amendment to the constitution of the United States of America." Amendment and Revision of Motion for Reconsideration and Petition for Rehearing of July 29, 1975 at pp. 1 and 2.

The fifth question was raised at this time because, in reliance on the plain language of the statute,[20] Appalachian had expected the West Virginia Court to issue the kind of decision due process would require. Only after the court had summarily declined to decide the controversy before it was Appalachian in a position to challenge the constitutionality of the statute, as so interpreted by the West Virginia Court. *Missouri ex rel. Missouri Insurance Company* v. *Gehner*, 281 U.S. 313, 320 (1930). See also, *Saunders* v. *Shaw*, 244 U.S. 317, 320 (1917).[21]

On July 29, 1975, the West Virginia Court rejected without discussion Appalachian's July 23 motion and petition on the ground that it was "not timely filed" even though the petition was filed within the time period specified by the court's rule on petitions for rehearing. As the motion and petition clearly was filed in accordance with the court's rules,[22] Appalachian submits

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[20]". . . [t]he court shall decide the matter in controversy as may seem to be just and right." West Virginia Code, Chapter 24, Article 5, Section 1; Appendix to Jurisdictional Statement, p. 94.

[21]The West Virginia Court has in the past held that:

". . . an order of the public service commission based upon a finding of facts which is contrary to the evidence, or is not supported by the evidence, or is arbitrary, or is based upon a mistake of law, will be reversed and set aside by this Court upon review. [citations omitted]" *United Fuel Gas Co.* v. *Public Service Commission of W. Va.*, 143 W. Va. 33, 46, 99 S.E.2d 1, 9 (1957).

[22]"Rule XIII—Rehearing.

1. How obtained. All petitions for rehearing must be filed in the clerk's office not later than thirty days from the date of the decision complained of . . . ." Rules of Practice in the Supreme Court of Appeals of West Virginia, West Virginia Code, Vol. 1 (1973 Replacement Volume); Appendix to Jurisdictional Statement, p. 97.

The order to which the motion and petition was addressed was issued June 23, 1975; the motion and petition was filed on July 23, 1975; thus the motion for reconsideration and petition for rehearing was filed in accordance

(footnote continued on next page)

that the repugnance of West Virginia Code, Chapter 24, Article 5, Section 1, to the Constitution of the United States was properly drawn in question in proceedings below.

On October 10, 1975, the Commission ordered rates into effect for the period July 29, 1971 through December 31, 1973, thereby requiring that cash refunds of over $23 million, including interest, be completed by February 7, 1976 in accordance with its order of January 31, 1975, as amended. On October 14, 1975, Appalachian filed its second Notices of Appeal to the Supreme Court of the United States with the Clerk of the West Virginia Court and with the Commission.[23]

(footnote continued from preceding page)

with the rule. This Court must look behind the machinations of the West Virginia proceeding and act to vindicate the federal rights of Appalachian. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 455 (1958); *Staub* v. *Baxley*, 355 U.S. 313, 318-320 (1958); *Ward* v. *Love County*, 253 U.S. 17, 22 (1920). As was said in *Wolfe* v. *North Carolina*, 364 U.S. 177, 185 (1960), "It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward nonfederal grounds of decision which are without any fair or substantial support. [citations omitted]"

[23]By application dated September 8, 1975, Appellant requested this Court to extend for 60 days the time within which Appellant was required to docket its appeal pursuant to Notices of Appeal filed June 30 and July 2, 1975. Appellant at that time intended to institute before the United States District Court for the Southern District of West Virginia an action pursuant to 28 U.S.C. §2281 for an injunction to restrain enforcement by appellee of its orders which are the subject of this appeal. Appellant was granted a 30-day extension of the time to docket an appeal to and including October 22, 1975. In the meantime Appellant has decided against instituting the action before the District Court.

The Questions are Substantial

The questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution. The grounds and reasons for this statement are as follows:

The procedures practiced by the Commission and by the West Virginia Court in the proceedings below have violated the Due Process Clause of the Fourteenth Amendment and the Just Compensation Clause of the Fifth Amendment as made applicable to the states by the Fourteenth Amendment. *Duncan* v. *Louisiana*, 391 U.S. 145, 148 (1968). These provisions require that a person be afforded an opportunity to present evidence and have a decision upon such evidence before a state, by its courts or administrative agencies, may deprive it of its property and further require that any such taking of property may be accomplished only upon just compensation to its owner. By imposing the rate levels prescribed in the Commission's January 31, 1975 order which Appalachian has sought to prove are confiscatory and by ordering cash refunds of over $23 million[24] to Appalachian's customers, while refusing to hear evidence of Appalachian's actual earnings during the refund period, and by issuing its cease and desist order of September 16, 1974 without affording Appalachian notice or opportunity to be heard, the State of West Virginia has exceeded the bounds of constitutionally authorized regulation.

The procedures followed by the Commission and the West Virginia Court in this case have repeatedly denied Appalachian its basic constitutional right to present evidence at a hearing and, in addition to depriving Appalachian of its property without due process of law, may

[24]This amount is more than 100% of Appellant's 1970 net operating income per books attributable to West Virginia operations.

set a dangerous precedent for similar transgressions in the future. The relief which Appalachian has sought has been the opportunity to present evidence of its actual results for the refund period—and that basic right to be heard has been summarily denied throughout the state procedure.

Although administrative powers may be far-reaching and judicial review may be limited, the Constitution of the United States guarantees to both individuals and corporations certain fundamental rights. Procedural due process is the mainstay of those rights and must not be compromised. Resolution of the issues in this case transcends state boundary lines and is vital to the protection of virtually every business in the country subject to administrative regulation.

Summary

The United States Supreme Court has jurisdiction of this appeal because the highest court of the State of West Virginia has upheld, against claims of repugnance to the Constitution of the United States, a statute of the State of West Virginia and orders of the Commission which are "statutes" within the terms of 28 U.S.C. §1257(2).

Enforcement of the orders of the Commission, as upheld by the West Virginia Court, and without an evidentiary hearing and judicial determination thereon, is repugnant to the Constitution of the United States by depriving Appalachian of its property without due process and without just compensation.

The extraordinarily stale test period evidence and numerous other procedural faults permeating this proceeding require that Appalachian be afforded an opportunity to present evidence of actual results in order to

comport with constitutional requirements of fair play and due process.

The participation before the Commission in this proceeding of attorney McDonald by serving as counsel and presenting exhibits for an intervenor, and his subsequent participation as the Commission's Staff counsel, creates an appearance of impropriety which vitiates Appellant's constitutionally guaranteed due process.

Due process compels the conclusion that the Commission's September 16, 1974 order is void and unenforceable for having been promulgated without affording Appellant notice or opportunity to be heard.

West Virginia Code, Chapter 24, Article 5, Section 1, is constitutionally invalid as interpreted by the highest court of the State of West Virginia by depriving Appalachian of judicial review of the Commission's legislative acts.

The Supreme Court has Jurisdiction to Review by Direct Appeal

The instant appeal is properly brought under 28 U.S.C. §1257(2) from the summary order of the Supreme Court of Appeals of West Virginia of June 23, 1975, as upheld by its order of July 29, 1975, which effectively sustained the orders of the Commission of September 16, 1974 and January 31, 1975, as amended and affirmed. *Atchison, Topeka & Santa Fe Ry.* v. *Public Utilities Commission of California, supra,* pp. 348, 349; *Bluefield Water Works & Improvement Company* v. *Public Service Commission of West Virginia, supra,* p. 683; *Lake Erie & Western R.R.* v. *State Public Utilities Commission of Illinois, supra,* p. 424; and *Grand Trunk Western Ry.* v. *Railroad Commission of Indiana, supra,* p. 403.

In *Atchison*, the California Commission issued orders requiring installation of grade separations at certain railroad crossings and allocating part of their cost to the appellant under provisions of the California Code. On petitions to the Supreme Court of California that court summarily denied review of the Commission orders. On appeal, this Court said:

> "We think the Commission's orders must be treated as an act of the legislature for purposes of determining our jurisdiction under 28 U.S.C. §1257(2). [citations omitted]" *supra,* p. 348.

This Court noted that the appellant had presented squarely to the Supreme Court of California its contention that, in the allocation of costs, the Commission's orders had taken appellant's property without due process of law and that in sustaining the Commission's orders by denying writs of review, the Supreme Court of California had upheld the statute as applied by the Commission, and the case was therefore properly before the Supreme Court of the United States on appeal.

In *Bluefield*, the Court decided that the validity of an order prescribing rates may be reviewed on appeal. The Court said:

> "The prescribing of rates is a legislative act. The commission is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment by the legislature. If, as alleged, the prescribed rates are confiscatory, the order is void. Plaintiff in error is entitled to bring the case here on writ of error and to have that question decided by this Court." *supra,* p. 683.

The instant proceeding is properly brought to this Court by appeal under 28 U.S.C. §1257(2).

Appellant Must Not be Deprived of Its Property without Just Compensation Determined upon Evidence in a Judicial Proceeding

Due process requires that citizens be given access to a judicial forum for vindication of constitutional rights. See *Truax* v. *Corrigan*, 257 U.S. 312, 332-334 (1921); and *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring). These rights include an opportunity to present evidence and have a judicial determination upon the citizen's assertion that it has been deprived of its property without due process of law:

> "... [W]hen [a property owner] appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount. The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it. [citations omitted]" *Baltimore & Ohio R.R.* v. *United States*, 298 U.S. 349, 368-369 (1936); *see also Georgia Ry. & Electric* v. *Decatur*, 295 U.S. 165, 170-171 (1935).

By its petition for rehearing before the Commission, Appalachian challenged the Commission's January 31, 1975 rate order as being confiscatory and sought an opportunity to present evidence to the Commission in support of, and to have an adjudication of, its claim of confiscation. The Commission by its order of March 21, 1975 denied Appalachian this opportunity for the period July 29, 1971 through December 31, 1974.

Appalachian then utilized the statutory remedy provided by West Virginia law to renew its protest that the Commission's January 31, 1975 order, as affirmed in part by its March 21, 1975 order, is confiscatory and sought a remand to the Commission to receive and act on Appalachian's evidence. The West Virginia Court by

its orders of June 23, 1975 and July 29, 1975 denied the review and remand.

On a claim of confiscation, a utility is not limited to review of the evidence developed before a commission during the rate-making process. This Court in *Baltimore & Ohio R.R.* v. *United States, supra*, pp. 368-372, said that a utility during the legislative rate-making process is not required to foresee that confiscatory restitution would be required; it is not bound, in advance of a commission's findings and report, to set up a fear of transgression of its constitutional rights; and a utility may presume that a commission will keep within the law.

Evidence utilized by the Commission in its legislative capacity to establish Appalachian's rates for the refund period is not a sufficient record in a judicial forum when a constitutional attack of confiscation is made upon those rates. Appalachian is entitled under the Due Process Clause to introduce evidence in a judicial forum and have a judicial determination made based upon that evidence on the issue of confiscation. *Baltimore & Ohio R.R.* v. *United States, supra*, pp. 363-369.

In *Baltimore & Ohio*, railroad companies attacked as confiscatory an order of the Interstate Commerce Commission prescribing divisions of rates between carriers. Following unsuccessful efforts by the railroad companies to obtain a rehearing before the Commission, they instituted an injunction action in a federal district court to enjoin enforcement of the order. At the trial the Commission moved that no evidence be received other than that contained in the record before the Commission. Although the district court denied the motion, the United States Supreme Court on appeal found it necessary to decide what, in respect of admission and consideration of evidence, should have been the scope of the trial in the district court. In its decision on this issue, this Court found that

"[t]he district court rightly held [the railroad companies] entitled to introduce evidence in addition to that contained in the record before the commission, and rightly proceeded, upon consideration of all the evidence, to make findings and, upon the basis of the facts that it found, to decide upon the constitutional question." *supra*, p. 372.

In its opinion, the Court in *Baltimore & Ohio* said that in prescribing divisions the Commission was exercising a legislative function and went on to assert:

"The just compensation clause may not be evaded or impaired by any form of legislation. Against the objection of the owner of private property taken for public use, the Congress may not directly or through any legislative agency finally determine the amount that is safeguarded to him by that clause. If as to the value of his property the owner accepts legislative or administrative determinations or challenges them merely upon the ground that they were not made in accordance with statutes governing a subordinate agency, no constitutional question arises. But, *when he appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount.* The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it. [citations omitted]" *supra*, pp. 368-369. [emphasis supplied].

Appalachian does not dispute the proposition that, where a full and fair hearing of all justiciable issues has been held before a properly constituted administrative tribunal exercising judicial functions, review on appeal may be limited without violating the Due Process Clause. *See Alabama Public Service Commission* v. *Southern Ry.*, 341 U.S. 341, 348-350 (1951). Nor does it

deny that once a full adjudicatory hearing upon an evidentiary record has been held, whether by court or administrative agency, "due process does not require that a decision made by an appropriate tribunal shall be reviewable by another." *St. Joseph Stock Yards Co.* v. *United States*, *supra*, p. 77 (Brandeis, J., concurring).

However, "[a] hearing is not judicial, at least in any adequate sense, unless the evidence can be known." *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio (No. 1)*, 294 U.S. 63, 69 (1935); *accord, Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 304 (1937). The only evidentiary record in this proceeding was made while the Commission acted in a legislative capacity;[25] was based upon a record which was so stale as to be constitutionally invalid for purposes of ordering refunds; and was made before any constitutional challenge could be made to the rates ultimately prescribed. To shield the Commission's legislative actions from judicial scrutiny by denying a hearing and opportunity to present evidence on the constitutional issue of confiscation in a judicial forum, whether before the Commission in a judicial capacity or before a court, and to deny opportunity for a determination on such evidence, is a denial of due process. *St. Joseph Stock Yards Co.* v. *United States*, *supra*, p. 51-52.

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[25]The Commission has acted in both legislative and judicial capacities in this case. By establishing rates in its order of January 31, 1975, the Commission acted in a legislative capacity. *Bluefield Water Works* v. *Public Service Commission of W. Va.*, *supra*, p. 683. Thereafter, in response to allegations that the rates established were confiscatory and demands for an opportunity to challenge them as invalid under the constitution, the Commission acted in a judicial capacity by its orders of February 14, 1975 and March 21, 1975 to the extent that such orders affirmed the January 31, 1975 rates and denied Appalachian's request to present evidence of actual earnings in the refund period. *Morgan* v. *United States*, 298 U.S. 468, 480 (1936) (hereinafter cited as *Morgan I*); *Atlantic Greyhound Corp.* v. *Public Service Commission of W. Va.*, *supra*, p. 659, 54 S.E. 2d p. 174.

Fair Play and Due Process Require that Appellant be Afforded an Opportunity to Present Evidence of its Actual Results and to have a Judicial Determination Thereon

If the rudiments of due process are to be salvaged in this proceeding, the absolute minimum relief required is for Appalachian to have an opportunity before the Commission or another competent tribunal acting in a judicial capacity to present Appalachian's actual experience during the period July 29, 1971 through December 31, 1973.[26] It is upon the allegedly excessive revenues received during such period that the Commission has based its order that Appalachian refund to its customers in excess of $23 million.

The most egregious of the numerous procedural transgressions to which Appellant has been subjected is the regulatory lag which resulted in rates being promulgated more than four years after the test period upon which they were based. Part of this delay was incurred in the 13-month period elapsed from the end of hearings in late 1973 to the decision rendered on January 31, 1975 in direct contravention of the standard set by West Virginia Code, Chapter 24, Article 2, Section 4, which requires that final decision be rendered within three months after completion of hearings. If, as the Commission contended in its Statement to the West Virginia Court,[27] this statute is only "directory and not mandatory," it is at least indicative of the due procedural bounds within which the Commission is to exercise its delegated legislative powers.

[26]The Commission, by its March 21, 1975 order, has already afforded Appellant similar relief for the period January 1, 1974 through March 31, 1975.

[27]Statement dated April 22, 1975, *supra*, p. 17.

It is characteristic of this proceeding that the Commission, while finding that Appalachian's interest coverage on debt if no rate relief had been allowed would have been only 1.93 times at year-end 1972 and 1.99 times at year-end 1973,[28] denied all but 14% of the rate relief requested and arbitrarily refused to hear evidence of Appalachian's actual financial results for the period July 29, 1971 through December 31, 1973. Yet the Commission has allowed corresponding evidence to be presented for the period commencing January 1, 1974.

The Commission purports to overcome its superficial determination with respect to interest coverage on debt by its independent examination of Appalachian's annual reports submitted to the Commission for the years 1972 and 1973 which were not presented as evidence in this proceeding.[29]

This Court has specifically rejected such resort to annual reports not present in the record. In *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio (No. 1)*, *supra*, p. 70, it was stated that "the weakness of the case for the appellee is that the fundamentals of a fair hearing were not conceded to the company. Opportunity did not exist to supplement or explain the annual reports . . . ."

The procedural excesses embodied in the dual role of attorney McDonald permitted by the Commission and its failure to give notice and afford an opportunity to be

[28]Appendix, pp. 37 and 46. Under its debenture indenture, in order for Appalachian to issue additional mortgage bonds or other long-term debt (except for a refunding), Appalachian must have earnings coverage before income tax of at least twice the pro forma total annual interest charges on its bonds and such other debt. Thus, entirely apart from the requirements of the market place, to sell additional debt securities Appalachian must have coverage in excess of two times in order to cover the interest charges on the new securities. The coverage figures relied upon by the Commission do not include any additional interest associated with new long-term debt.

[29]Appendix, pp. 37, 46; and pp. 9(n.1), 12 and 13 of the Statement dated April 22, 1975, *infra*, p. 12 (n.19).

heard prior to issuance of its September 16, 1974 order are discussed under separate headings herein.

Even if these manifold departures from the constitutional requirements of procedural due process did not undermine this proceeding, the stale evidentiary base alone would require consideration of Appalachian's actual results for the refund period July 29, 1971 through December 31, 1973. The overwhelming weight of authority supports the view that prior to ordering refunds, a regulatory body must examine the Company's actual experience during the refund period. See, *e.g.*, *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio (No. 2)*, *supra*, p. 82; *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U.S. 151, 163 (1934); *Williams* v. *Washington Metropolitan Area Transit Commission*, 415 F.2d 922, 946 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969); and *New York Telephone Company* v. *Public Service Commission of New York*, 29 N.Y.2d 164, 169, 324 N.Y.S. 2d 53, 55, 272 N.E. 2d 554, 557 (1971). This Court has cogently stated:

> "There are times, to be sure, when resort to prophecy becomes inevitable in default of methods more precise. At such times, 'an honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances' . . . is the only organon at hand, and hence the only one to be employed in order to make the hearing fair. But prophecy, however honest, is generally a poor substitute for experience. 'Estimates for tomorrow cannot ignore prices of today.' . . . [citations omitted]" *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio (No. 2)*, *supra*, p. 82.

A recent proceeding involving the New York Telephone Company is instructive. The company filed tariff revisions on March 20, 1969 designed to produce increased revenue of $175 million. On February 24, 1970

the company was permitted to increase its rates subject to refund by approximately $136 million. By orders dated July 1 and September 1, 1970, the New York Public Service Commission determined that, based on the test year 1968, the company was entitled to increase its revenues by only $120 million and it ordered the company to refund amounts collected at temporary rates in excess of the lower rates ultimately determined to be reasonable.

Just prior to the Commission's order of July 1, 1970, and more than 8 months after the hearings had concluded, New York Telephone filed a request that the record be reopened to permit introduction of evidence concerning the company's actual earnings experience since the record was closed. The Commission denied this request.

On review, the New York Court of Appeals held that the ordering of refunds based only upon out-of-date evidence and the refusal to reopen the hearing was arbitrary. The Court said:

> "The law is well-settled that the Commission may not rely on a reckoning when actual experience is available and establishes that the predictions have been substantially incorrect. . . . This principle applies not only in cases where the rate proceeding fixes the rate but *especially where the Commission directs refunds*. . . .
>
> An attempt to give prediction first place and experience the second is barred whether the attempt is made by the utility or the officers of government prescribing rates. In either case, the subscribers . . . as well as the Company, must be given a full hearing. Under the unusual circumstances of this known experience in this case, to compel the Company to accept the substantially inaccurate determination of the Commission is to deny it due process." *New York Telephone Company* v. *Public*

Service Commission of New York, supra, pp. 169-171, 324 N.Y.S. 2d pp. 55-57, 272 N.E. 2d pp. 556-557. [emphasis supplied].

In fact, the excluded evidence regarding Appalachian's earnings in the refund period is the best and only judicially acceptable measure of constitutional rates; yet this information was excluded despite diligent efforts by Appalachian to place it in the record. When a party has been barred from placing in the record in a judicial proceeding data basic to the determination of a constitutional issue, this constitutes a denial of due process. *Georgia Ry. & Electric* v. *Decatur, supra*, pp. 170-171. Unless this Court can say that the evidence offered by Appalachian of its actual results for the refund period "could not conceivably establish that the action of the [Commission] in imposing the [rate schedule] was arbitrary and unreasonable", an opportunity to present this evidence should be allowed as a matter of right. *Nashville, Chattanooga & St. Louis Ry.* v. *Walters*, 294 U.S. 405, 415-416 (1935). The consideration of actual operating results for the period July 29, 1971 through December 31, 1973 is a fundamental prerequisite to assuring a proper measure of the rudiments of fair play which are necessarily included in the Fourteenth Amendment. *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio (No. 2), supra*, p. 81; *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio, supra*, p. 304.

The Dual Roles of Attorney McDonald Have Deprived Appellant of Its Constitutional Right to Procedural Due Process of Law

Appellant's fundamental right to procedural due process was further abridged when the Commission and the West Virginia Court permitted attorney McDonald to occupy roles as counsel for an intervenor throughout

the hearings and as staff counsel for the Commission throughout the Commission's decisional process.

It is fundamental that the procedural due process requirements of the Fourteenth Amendment to the Constitution of the United States mandate a fair and impartial hearing and decision in fixing rates. This requirement and its rationale were thoroughly set forth by this Court in *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio, supra*, pp. 304-305:

> "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. . . .Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard'. . .of a fair and open hearing be maintained in its integrity. . . .The right to such a hearing is one of 'the rudiments of fair play'. . .assured to every litigant by the Fourteenth Amendment as a minimal requirement. [citations omitted]"

Also, see generally *Morgan I, supra*, p. 480. In its second hearing of the *Morgan* case, *Morgan* v. *United States*, 304 U.S. 1, 22 (1938) (hereinafter cited as *"Morgan II"*), this Court stressed the importance of maintaining proper "fair play" standards in the conduct of administrative proceedings:

> "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said

> at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

Although it has been held that due process is an elusive concept, that its exact boundaries are indefinable, and that its content varies according to specific factual contexts [*Hannah* v. *Larche*, 363 U.S. 420, 442 (1960); *Davis* v. *Ann Arbor Public Schools*, 313 F. Supp. 1217, 1225 (E.D. Mich. 1970); and *Whitfield* v. *Simpson*, 312 F. Supp. 889, 894 (E.D. Ill. 1970)], an administrative hearing of such importance and vast potential consequences as the one under review

> ". . . must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process." *Amos Treat & Co.* v. *Securities and Exchange Commission*, 306 F.2d 260, 267 (D.C. Cir. 1962).

See also, *Cinderella Career and Finishing Schools, Inc.* v. *Federal Trade Commission*, 425 F.2d 583, 591 (D.C. Cir. 1970); *Texaco, Inc.* v. *Federal Trade Commission*, 336 F.2d 754, 760 (D.C. Cir. 1964); and *Wall* v. *American Optometric Association, Inc.*, 379 F. Supp. 175, 188 (N.D. Ga. 1974), *aff'd mem.*, 419 U.S. 888.

The chameleon-like roles of attorney McDonald unquestionably have tainted the appearance of fairness in this long proceeding. The Commission's decision, its gratuitous remarks about his brief,[10] and the end result of the decision itself lend conclusive support to the

[10] Appendix, p. 16.

proposition that his role as an advocate for an intervenor and then for the Commission transcend normal bounds of advocacy.

In the capacity of private advocate, attorney McDonald, through more than 140 transcript pages of cross-examination, dutifully and exhaustively represented the interests of his client, an intervenor which strenuously opposed Appalachian's proposed rates. Thereafter, ten days before the hearings terminated, attorney McDonald assumed the role of Commission Staff counsel where, in his official capacity, he submitted a brief that was signed and apparently was prepared largely by him, advising the Commission of the Staff position, which was substantially in opposition to Appalachian's application for rate relief. Two of the three commissioners who heard parts of the evidentiary record had since resigned from the Commission, and the Commission placed substantial reliance upon the Staff's brief, which the Commission chose to characterize as "the only one to attempt to come to grips with most, but not all, of [the issues in the case]."[11] Indeed, many of the conclusions and recommendations of this brief were incorporated by the Commission in its order of January 31, 1975.

Certainly, the "very appearance," if not the actuality, of complete fairness in the proceeding before the Commission was corrupted by the inconsistent roles played by the same attorney in the same administrative proceeding. In a proceeding of such public importance,[12] not even the appearance of complete fairness should be sacrificed.

[11] *Ibid.*

[12] Ultimately, the proceeding will affect nearly every resident of Appalachian's West Virginia service territory, which encompasses about one-half of the State of West Virginia.

The actions of attorney McDonald in this proceeding are closely akin to the situation facing the court in *General Motors Corporation* v. *New York*, 501 F.2d 639 (2d Cir. 1974), where the attorney in question had worked for the Justice Department and was thereafter retained by the City of New York to bring a class action in a matter nearly identical to one he had participated in when he was in Federal employment. In disqualifying the attorney from participating in the City's case, the court relied heavily upon Canon 9 of the Code of Professional Responsibility,[11] which provides:

> "A lawyer should avoid even the appearance of professional impropriety."

The court noted that Disciplinary Rule 9-101(B) provides a measure of specificity to this general caveat and commands:

> "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

After review of the facts, the court concluded:

> "Accordingly, without in the least even intimating that [the attorney] himself was improperly influenced while in Government service, or that he is guilty of any actual impropriety in agreeing to represent the City here, we must act with scrupulous care to avoid any *appearance* of impropriety lest it taint both the public and private segments of the legal profession." *General Motors, supra*, p. 649.

A novel reversal of the situation contemplated in

[11] The Code of Professional Responsibility, including Canon 9, appears in the Appendix to the West Virginia Code in Vol. 1 (1973 Replacement Volume), Appendix, p. 445.

General Motors, supra, and Disciplinary Rule 9-101(B) is presented here by the dual role of attorney McDonald —an attorney who, on behalf of a private litigant, actively participated throughout the hearings before the Commission and then, as a public employee of the Commission, continued to participate actively in the very same proceeding.

Public confidence in the administrative process must be preserved. *Morgan II, supra*, p. 15. Public confidence in the affairs of government cannot help but be seriously undermined if an attorney can appear to influence the outcome of a proceeding by switching sides during the course of that proceeding, regardless of whether or not the outcome is actually altered. The inescapable fact is that public faith in the integrity of the regulatory process would have been severely eroded if Appalachian's counsel had "switched sides" during the course of the proceeding, had occupied an official position next to the Commission itself, had written the brief on behalf of the Commission Staff, and the Commission had thereafter approved Appalachian's requested increase in its entirety. The integrity of the regulatory process has here been unconditionally compromised in exactly this manner by the Commission's acquiescence in attorney McDonald's dual role.

It is axiomatic that if the order appealed from is found to be premised upon an unfair hearing then such order must be set aside and the case remanded for a new hearing:

> "The due process requirement of a fair hearing is unwavering even though the findings of an unfair hearing might otherwise be justified on the merits." *Great Lakes Screw Corporation* v. *N.L.R.B.*, 409 F.2d 375, 382 (7th Cir. 1969).

> "Nor will the fact that an examination of the record shows that there was evidence which would support the judgment, at all save a trial from the charge of unfairness . . . . Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand." *N.L.R.B.* v. *Phelps*, 136 F.2d 562, 563-564 (5th Cir. 1943).

Although it is not known to what extent the attorney's behavior may have affected the Commission's ultimate decision, the very appearance of unfairness requires that the Commission orders should be set aside.

The Commission's Order of September 16, 1974 is Void for Failure to give Notice and Opportunity to be Heard

Without first giving to Appalachian any notice or opportunity to be heard, the Commission entered an interim order on September 16, 1974[14] in this same rate proceeding (Case No. 7083) ordering Appalachian to cease and desist immediately "its practice of 'repricing' coal purchased from affiliated interests for inclusion in the Fuel Adjustment Clause. . . ."

The Commission issued this cease and desist order despite the fact that Appalachian, with full knowledge of the Commission, was pricing coal purchased from affiliated interests strictly in accordance with tariffs duly filed with the Commission. Appalachian's tariff filed on February 22, 1971 and made effective July 29, 1971 provided that "[f]or the purpose of computing fuel costs under this fuel clause, the price paid for coal will be based solely on purchases from non-affiliated mines." Such pricing based "solely on purchases from non-affiliated mines" was in compliance with the Commission's

[14]Appendix, p. 1.

policy as embodied for many years in Appalachian's duly approved fuel clauses.

It is, of course, a fundamental precept of American jurisprudence that no person shall be deprived of life, liberty or property without due process of law. A basic element of due process, guaranteed by the Fourteenth Amendment to the United States Constitution, is the right to a hearing based upon adequate notice.

This Court has clearly recognized the right to notice and hearing. In *Interstate Commerce Commission* v. *Louisville and Nashville R.R.*, 227 U.S. 88, 91 (1913), the Court observed:

> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' . . . or if the facts found do not, as a matter of law, support the order made . . . . [citations omitted]"

The principle that an individual or a corporation is entitled to at least notice and a hearing before an administrative agency issues an order affecting fundamental rights was so clear to the court in *A. E. Staley Mfg. Company* v. *United States*, 310 F. Supp. 485, 488 n.4 (D. Minn. 1970), that it held without discussion that "[o]f course, an order issued without the benefit of notice, a hearing and a record on which the order is based is void. [citations omitted]" See also, *Hoxsey Cancer Clinic* v. *Folsom*, 155 F. Supp. 376, 378 (D.D.C. 1957).

It has long been settled that an administrative proceeding of a quasi-judicial character carries with it the fundamental procedural requirement of a full hearing in which evidence is received and weighed by the trier of

facts. *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio, supra*, p. 304-5 and cases cited therein; *Morgan I, supra*, p. 480.

Without any notice or hearing, the Commission ordered Appalachian to cease and desist certain practices which conformed to its tariffs on file with the Commission. The Court has found that:

> "a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal [citations omitted]." *Londoner* v. *Denver*, 210 U.S. 373, 386 (1908).

The procedure followed by the Commission and the West Virginia Court in this case has denied Appalachian the basic right to a hearing and may set a dangerous precedent for similar actions in the future. It is submitted that the Commission's order of September 16, 1974 is void.

West Virginia Code, Chapter 24, Article 5, Section 1, as Applied herein, is Repugnant to the Constitution of the United States

West Virginia Code, Chapter 24, Article 5, Section 1, as applied by the West Virginia Court in this case, is repugnant to the Fourteenth Amendment of the Constitution of the United States.

Where there has been a legislative determination promulgated by the Commission such as that embodied in the rate order of January 31, 1975, as amended, it is elementary to due process that there must be an avenue of judicial review available to the party whose action is regulated by the legislative determination. Appalachian, as the party affected, first sought quasi-judicial review before the Commission, but such review was denied by

the Commission's order of March 21, 1975. The statutorily prescribed procedure for review of the Commission's action appears at West Virginia Code, Chapter 24, Article 5, Section 1, and provides for appeal directly to the Supreme Court of Appeals of West Virginia, the highest court of that state. Appalachian therefore sought such review by application filed April 7, 1975 with the West Virginia Court.

Appalachian submits that under the facts of this case, where Appalachian has challenged the rates established as confiscatory, where refunds have been ordered based upon those rates and where the basis for the rates is a test period more than four years old at the time rates were set, judicial review required to satisfy due process must include consideration of the actual experience of the Company during the refund period. *Baltimore & Ohio R.R.* v. *United States, supra*, pp. 368-369. West Virginia Code, Chapter 24, Article 5, Section 1, would on its face encompass such judicial review by the words ". . . the court shall decide the matter in controversy . . . ."[35] However, by its order of June 23, 1975, the West Virginia Court denied any review considering the Company's actual experience by summarily finding that Appalachian was not entitled to the relief requested in its petition. The West Virginia Court confirmed its summary disposition of Appellant's petition by denying on July 29, 1975 Appellant's motion for reconsideration and petition for rehearing without making any response to Appellant's assertion that, as applied in this case, West Virginia Code, Chapter 24, Article 5, Section 1, is repugnant to the Constitution of the United States.

If the Commission is free to decline to act in a judicial capacity to hear constitutional challenges to a rate

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[35] Appendix, p. 94.

schedule "enacted" by the Commission, and if the West Virginia Court, the only court authorized by statute to review orders of the Commission, is free to decline to judicially decide constitutional challenges to such rate schedules, then parties, such as Appalachian, will be precluded from litigating constitutional issues before any tribunal acting in a judicial capacity in violation of the Due Process Clause of the Fourteenth Amendment. Accordingly, Appalachian contends that West Virginia Code, Chapter 24, Article 5, Section 1, is repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States as the statute is construed and applied under the facts of this case by the highest court of the State of West Virginia.

Conclusion

This Court has jurisdiction of this appeal and should review the substantial questions which are presented.

Appalachian has been ordered by the Commission to refund to its customers in excess of $23 million applicable to the period July 29, 1971 through December 31, 1973. This order was issued in 1975, on the basis of a 1970 test year. Appalachian repeatedly has urged that the order of the Commission does not meet even the minimal standards of due process and repeatedly has sought an opportunity to present evidence to this effect before the Commission or other competent judicial forum. Appalachian not only has been refused a judicial hearing on the issue of confiscation, but the West Virginia Court has twice refused to review the constitutional issues raised. This Court is Appalachian's final resort.

This Court should note probable jurisdiction, or, in the alternative, vacate the final orders appealed from

and remand the case for the taking of evidence of Appellant's actual results from July 29, 1971 through December 31, 1973 and for decision thereon as herein described, and this Court should grant Appellant such further relief as it may deem appropriate.

Respectfully submitted,

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October 21, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-599

APPALACHIAN POWER COMPANY,

Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF APPEALS OF THE STATE OF WEST VIRGINIA

APPENDIX TO JURISDICTIONAL STATEMENT

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PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, at the Capitol in the City of Charleston on the 16th day of September 1974.

CASE NO. 7083

APPALACHIAN POWER COMPANY,
a corporation.

In the matter of
increased rates and charges.

WHEREAS, on February 22, 1971, Appalachian Power Company, a corporation (hereinafter "Applicant"), filed its application for an increase in revenue from the sale of electricity in West Virginia, which application included a revision in Applicant's Fuel Adjustment Clause; and

WHEREAS, on or about July 29, 1971, the proposed rates, together with the revised Fuel Adjustment Clause, became effective under bond pursuant to statute; and

WHEREAS, it has come to the attention of the Commission that Applicant is collecting more revenues by reason of operation of the Fuel Adjustment Clause than the actual increased cost of fuel over 28.5 cents per MBTU because of its practice of "repricing" coal purchased from affiliated interests to the average price Applicant pays for coal purchased from non-affiliated interests, which practice may, pending further investigation and review, require the refunding of such overcharges by Applicant;

IT IS, THEREFORE, ORDERED that, effective immediately, Applicant cease and desist its practice of "repricing" coal purchased from affiliated interests for inclusion in the Fuel Adjustment Clause, and further that

Applicant either include the costs of coal at actual cost or the average price Applicant paid for coal purchased from non-affiliated interests, whichever is less, or exclude entirely the volumes and costs of coal purchased from affiliated interests from the operation of the Fuel Adjustment Clause, until further order of the Commission.

A copy.

Teste:

s/ FREEDA P. JONES
Acting Secretary

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, at the Capitol in the City of Charleston on the 18th day of October, 1974.

CASE NO. 7083

APPALACHIAN POWER COMPANY,
a corporation.

In the matter of
increased rates and charges.

Petition to suspend and reconsider order of September 16, 1974.

This proceeding came on to be heard this 18th day of October, 1974, upon the petition filed September 24, 1974, by Appalachian Power Company, a corporation, (hereinafter "Applicant") to suspend the order of September 16, 1974, herein and for reconsideration thereof; and upon the decision heretofore announced by the Commission.

Such order states that further investigation and review will be made of Applicant's practice of "repricing" coal purchased from affiliated interests to the average price Applicant pays for coal purchased from non-affiliated interests. Pending such investigation and review this practice was to be terminated on September 16, 1974.

The effective date for calculating the fuel adjustment clause under the guidelines set forth in said order is September 16, 1974, and all bills rendered after that date should reflect the fuel adjustment as required by that order. Since Appalachian's bills contain a fuel adjustment

clause based on the cost of coal burned during the second month preceding the month of billing, it will be necessary for the company to recalculate and refile with the Commission the average cost of coal and resulting fuel adjustment factor beginning with coal burned during the month of July, 1974, and to apply the factor so calculated based on July, 1974, to September bills rendered after September 16, 1974.

Upon reconsideration of which the Commission is of opinion and finds that pending further investigation and review the material matters contained in the order of September 16, 1974, were fully considered by the Commission prior to the announcement of such decision; that the evidence in this case supports said order and that the petition to suspend and reconsider the decision of September 16, 1974, should be denied.

IT IS, THEREFORE, ORDERED that such petition be, and it hereby is, denied.

A Copy.

Teste:

S. GROVER SMITH, JR.
Secretary

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, at the Capitol in the City of Charleston on the 31st day of January, 1975.

CASE NO. 7083

APPALACHIAN POWER COMPANY,
a corporation.

In the matter of
increased rates and charges.

PROCEDURE

On February 22, 1971, Appalachian Power Company, a corporation, filed its Tariff P.S.C. W.Va. No. 2, cancelling and superseding P.S.C. W.Va. No. 1, stating an increase of approximately ten and one-half percent (10-1/2%) in rates and charges for furnishing electric service in the entire territory served by it in West Virginia, to become effective on all service rendered on and after April 1, 1971. By order entered herein on March 3, 1971, Appalachian Power Company was made respondent to this proceeding and the revised tariff was suspended and the use of rates and charges set forth therein deferred until July 29, 1971, unless otherwise ordered by the Commission.

Having been advised by the respondent of its intention to place into effect at the end of the suspension period the increased rates and charges contained in the aforesaid tariff, the Commission by order entered on July 20, 1971, required the respondent to file with the Commission a bond in the amount of Nine Million Dollars ($9,000,000) conditioned to secure the refunds to the persons or parties entitled thereto of the amount in

excess, plus interest at six percent (6%) per year, between the rates and charges placed into effect and those finally approved by the Commission. A proper bond was furnished and the increased rates and charges were accordingly placed into effect as of July 29, 1971.

By order entered herein on January 23, 1973, the matters involved in this proceeding were set for hearing to be held in the Commission's Hearing Room at the Capitol in the City of Charleston on April 9, 1973, beginning at 10 a.m., EST, and the respondent was required to give notice of the filing of its revised tariff and of the time and place of hearing thereon by publishing a copy of the order once a week for two (2) successive weeks, the first publication to be not more than thirty (30) days nor less than fifteen (15) days prior to April 9, 1973, in newspapers published daily in each of the Cities of Charleston, Beckley, Bluefield, Huntington, Logan, Point Pleasant, Welch, and Williamson. The respondent was further required to post a copy of the order giving notice of the filing of its revised tariff and the time and place of hearing thereon at each of its offices where bills for electric service were paid for a period of at least thirty (30) days prior to April 9, 1973.

Proper notice was given in all of the aforesaid cities and certification of the required postings was received. The hearing was held as scheduled on April 9, 1973. The respondent was represented by Charles C. Wise, Jr., attorney at law; the FMC Corporation, an intervenor, by F. T. Graff, Jr., attorney at law; Appalachian Research and Defense Fund and Mercer County Economic Opportunity Corporation, intervenors, by E. Dandridge McDonald, attorney at law; and the Logan Coal Operators Association, Island Creek Coal Company, and

Semet Solvay Division, intervenors, by F. Paul Chambers, attorney at law. The Commission staff was represented during all of the hearings by John E. Lee, General Counsel; Marian W. Louis, Assistant General Counsel; A. Byron Carver, Director, Division of Accounts, Finance and Rates; George R. Heath and Harold M. Howie, rate analysts; and W. J. Blake, engineer. In subsequent hearings held throughout this proceeding, T. D. Kauffelt, attorney at law, appeared for the FMC Corporation and for Allied Chemical Corporation, Mobay Chemical Company and Blaw-Knox Company, additional intervenors; and Charles Q. Gage, attorney at law, appeared for the Logan Coal Operators Association, Island Creek Coal Company, and Semet Solvay Division. Robert Rodecker, attorney at law, appeared for Appalachian Research and Defense Fund and the Mercer County Economic Opportunity Corporation. On November 30, 1973, E. Dandridge McDonald joined the legal staff of this Commission and participated in the preparation of the brief of the Commission staff as counsel.

Letters and petitions opposing the increases were received from cities and individuals. Further hearings were held on July 11, July 12, July 13, October 17, and December 10, 1973. At the close of the hearing held on December 10th, the case was submitted for decision, subject to the filing of briefs. The last brief was received on April 1, 1974.

EVIDENCE

The evidence in this case consists of a 775-page transcript of the proceedings, 42 exhibits received on behalf of the Company, 3 on behalf of the staff, and 5 on behalf of the residential intervenors.

Appalachian Power Company, a wholly-owned subsidiary of American Electric Power Company, Inc., a registered public utility holding company, is a large integrated electric power producer and distributor operating in 31 counties in Virginia and 21 counties in West Virginia. It is the principal supplier of electric energy in southern West Virginia and western Virginia, serving an area with a total population of approximately two million persons. At the time of the hearings, it was serving more than 260,000 residential, 31,000 commercial, and 900 industrial customers in West Virginia.

Accounting exhibits for the test year, which was the 1970 calendar year, were filed by the Company and the staff, and are summarized below:

APPLICANT'S EXHIBIT 21-R

Total Company Operations

	Per Books	Adjusted to Going Level
Operating Revenues		
Sales of Electricity	$197,449,108	197,449,108
Other	1,764,423	1,764,423
Total Operating Revenues	$199,213,531	199,213,531
Operating Revenue Reductions		
Operation & Maintenance	$101,326,791	108,094,791
Depreciation & Amortization Expenses	23,122,687	25,245,687
Taxes—Other	17,592,704	18,555,704
Federal Income Tax (FIT)	4,320,213	1,064,213
Total Operating Revenue Deductions	$146,362,395	152,960,395
Net Operating Income	$ 52,851,136	46,253,136
Rate Base—Adjusted	$	683,250,773
Rate of Return (on Rate Base Adjusted)		6.77%

Rate Base

	Per Books	Adjusted
Electric Plant and Construction Work in Progress (CWIP) in Service	$ 841,510,742	916,653,737
Electric Plant—Future Use	832,280	4,811,640
Accumulated Provision for Depreciation & Amortization	(260,607,645)	(262,730,645)
Contribution in Aid of Construction	(1,881,791)	(1,881,791)
Working Capital	25,551,832	26,397,832
Total Rate Base	$ 605,405,418	683,250,773

West Virginia Operations

	Per Books	Adjusted to Going Level	Pro Forma
Operating Revenues			
Sales of Electricity	$90,558,437	90,558,437	100,040,437
Other	951,814	951,814	951,814
Total Operating Revenues	$91,510,251	91,510,251	100,992,251
Operating Revenue Deductions			
Operation & Maintenance Expense	$46,319,102	49,430,577	49,439,577
Depreciation & Amortization	10,731,045	11,679,162	11,679,162
Taxes Other than FIT	9,439,334	10,116,985	10,670,985
Federal Income Tax	1,806,649	459,650	4,847,650
Total Operating Revenue Deductions	$68,346,130	71,686,374	76,637,374
Net Operating Income	$23,164,121	19,823,877	24,354,877
Rate Base—Adjusted	$	314,702,873	
Rate of Return (On Rate Base Adjusted)		6.30%	7.74%

Rate Base

	Per Books	Adjusted
Electric Plant & CWIP in Service	$ 388,843,643	421,643,994
Electric Plant—Future Use	384,578	2,223,353
Accumulated Provision for Depreciation & Amortization	(119,277,202)	(120,225,319)
Contribution in Aid of Construction	(1,003,193)	(1,003,193)
Working Capital	11,675,103	12,064,038
Total Rate Base	$ 280,622,929	314,702,873

Staff Exhibits 2 and 3

Total Company Operations

	Per Books	Going Level	Pro Forma
Operating Revenues			
Sales of Electricity	$197,449,108	197,449,108	206,931,108
Other	1,764,423	1,764,423	1,764,423
Total Operating Revenues	$199,213,531	199,213,531	208,695,531
Operating Revenue Deductions			
Operation & Maintenance Expenses	$101,326,791	102,674,035	102,674,035
Depreciation & Amortization	23,122,687	23,122,687	23,122,687
Taxes—Other than FIT	17,592,704	18,060,047	18,523,489
FIT (less deferrals & credits)	4,320,213	3,264,418	6,937,323
Total Operating Revenue Deductions	$146,362,395	147,121,187	151,257,534
Net Operating Income	$ 52,851,136	52,092,344	57,437,997
Rate Base—Adjusted	$	540,978,592	
Rate of Return (on Rate Base Adjusted)		9.63%	10.62%

Rate Base

	Per Books	Adjusted
Electric Plant in Service	$ 799,746,248	799,746,248
Electric Plant—Future Use	821,118	821,118
Accumulated Provision for Depreciation & Amortization	(253,884,162)	(253,884,162
Contribution in Aid of Construction	(1,760,856)	(1,760,856
Construction Work in Progress—in Service	9,860,478	9,860,478
Working Capital		
Materials & Supplies	11,365,303	11,365,303
Prepayments	611,187	611,187
Cash (⅛ Operation & Maintenance—Pro Forma)	9,463,588	9,631,994
Earned Surplus Restricted for Future FIT	(35,412,718)	(35,412,718)
Total Rate Base	$ 540,810,186	540,978,592

West Virginia Operations

	Going Level	Pro Forma
Operating Revenues		
Sales of Electricity	$ 90,558,445	100,040,445
Other	951,814	951,814
Total Operating Revenues	$ 91,510,259	100,992,259
Operating Revenue Deductions		
Operation & Maintenance Expenses	45,931,715	45,931,715
Depreciation & Amortization	10,550,043	10,550,043
Taxes—Other than FIT	9,741,596	10,205,038
FIT	3,293,146	6,966,051
Income Tax Deferred	(918,350)	(918,350)
ITC	(837,744)	(837,744)
Total Operating Revenue Deductions	$ 67,760,406	71,896,753
Net Operating Income	$ 23,749,853	29,095,506
Rate Base—Adjusted	$245,801,063	
Rate of Return (on Rate Base Adjusted)	9.66%	11.84%

Rate Base

Electric Plant in Service & CWIP in Service	$ 367,188,700
Electric Plant—Future Use	147,474
Accumulated Provision for Depreciation, Depletion & Amortization	(113,936,066)
Contribution in Aid of Construction	(957,915)
Earned Surplus Restricted for Future Use	(16,363,466)
Working Capital	
Materials & Supplies	5,100,378
Prepayment	277,197
Cash	4,366,108
Stores Expense	(21,367)
West Virginia Rate Base	$ 245,801,063

For purposes of outlining the issues to be determined in this proceeding with reference to the evidence, the following comparison from the data set forth above is recapitulated as follows:

	West Virginia Operation			
	Adjusted to Going Level		Pro Forma	
	Staff	Appalachian	Staff	Appalachian
Operating Revenues ..	$ 91,510,259	91,510,251	100,992,259	100,992,251
Operating Deductions .	67,760,406	71,686,374	71,896,753	76,637,374
Net Operating Income	$ 23,749,853	19,823,877	29,095,506	24,354,877
Rate Base—Adjusted .	$245,801,063	314,702,873	245,801,063	314,702,873
Rate of Return (on Rate Base—Adjusted)	9.66%	6.30%	11.84%	7.74%

This recapitulation reveals that both Appalachian and staff estimate the filed rates to produce an overall increase of $9,482,000 in test-year revenues from Appalachian's West Virginia customers. However, the comparison also highlights the substantial dispute which exists between the utility and the Commission's staff as to allowable operating revenue deductions in the magnitude of $4,740,621.

Moreover, the rate base claimed by Appalachian is $68,901,810 more than the $245,801,063 which the staff would allow.

Since the Commission is making various subsidiary findings on specific issues raised, the above recapitulation can only be used as a starting point for our consideration and a frame of reference.

Preliminary Comment

Before embarking upon the judgmental phase of this decision, certain unusual and extraordinary circumstances should be noted, as well as a statement of certain statutory guidelines and fundamental principles

which control this Commission in the ratemaking process.

This decision comes after a rate increase filing made effective tentatively nearly four years ago. Two of the three Commissioners who heard parts of the evidentiary record have since resigned from the Commission. At this time there is a vacancy of one Commissioner on the Commission. The present Chairman was appointed to the Commission on November 18, 1974. The two Commissioners that are deciding this case today have been subjected to various types of pressure, even to the point of being asked to disqualify themselves. After due consideration of this issue raised by the Commission on its own motion at the hearing held December 10, 1974, the Commissioners decided under the appropriate sections of the Code of Judicial Conduct that they were fully qualified to act as an administrative tribunal to decide this case.

This recital is not in criticism of anyone, either former Commissioners or counsel, but is made to accentuate the particular need for a decision in this case without further delay to preserve the public confidence in the Public Service Commission of West Virginia, as well as to provide the distributive justice required by the law and the record for all members of the public affected; that is, the people purchasing electricity, as well as those providing this public service and those who lend or invest their money to enable the enterprise to exist and grow.

Another unusual circumstance in this case is that the tariff sheets filed and under consideration in Case No. 7083 include the fuel adjustment clause of Appalachian Power Company. However, a hearing on *all* fuel adjustment clauses of electric utilities, including Appalachian,

was held in a separate proceeding, Case No. 7945. The hearing closed November 13, 1974, with the last brief having been filed December 19, 1974. The interrelationship of these two cases was emphasized when by order issued September 16, 1974, in Case No. 7083, Appalachian was required to cease and desist the practice of "repricing" coal purchased from affiliated interests for inclusion in charges under its fuel adjustment clause. The impetus for this order came from evidence presented in the hearing in Case No. 7945. Appalachian, by petition filed September 24, 1974, requested that this order of September 16, 1974, be suspended and for reconsideration thereof. By order of October 18, 1974, the aforesaid petition was denied. Since it is expected that the Commission's decision and order in Case No. 7945 will be issued soon, the decision and order in this proceeding, Case No. 7083, will be subject to subsequent action of the Commission in Case No. 7945 as it will relate to the fuel adjustment clauses of all electric utilities, including Appalachian Power Company.

Other unusual and extraordinary circumstances in this case, such as the necessity for anti-pollution facilities required by environmental law, the energy shortage and inflation will be commented upon in other parts of this decision.

Under the law, this Commission is obligated to set rates and charges of public utilities that are "just and reasonable" and so as "to prevent undue discrimination or favoritism." A controlling statute, Code of West Virginia, Chapter 24, Article 2, Section 3, provides that "in no case shall the rate, toll or charge be more than the service is reasonably worth, considering the cost thereof."

Thus, the ratemaking process—a quasi-legislative act performed in a quasi-judicial manner—seeks to set the lowest possible *reasonable* rates without *undue* discrimination in the exercise of its judgment in considering the utility's cost of providing service to the public. This is a concept of balance and fairness among all segments of the persons and groups of persons involved in a broad community. The Commission acts as a "consumer-oriented" regulatory body in a *positive* sense. That is, in seeing that the public is served at the lowest possible rates based on a consideration of cost, the Commission must regulate the utility in such a way that adequate revenues will be provided the utility so it will be able to pay all of its reasonable costs of doing business, including the costs of raising new money from the investing public for the installation of necessary facilities, as well as to pay dividends to its stockholders and to make principal and interest payments to its existing lending creditors. If this cannot be done, service to the consumer is jeopardized or actually adversely affected. Thus, although the Commission is "consumer-oriented," it is not anti-utility. It is merely anti-injustice, no matter from what source injustice comes, while striving for the ideal of distributive justice to all affected by its decisions.

The Issues

In addition to the usual basic and subsidiary ratemaking issues involving a determination of the rate base, allowable rate of return, and going level and pro forma adjustments to operating expenses, there are other issues raised on the record. These include allocations of costs affecting rate base and cost of service as between Virginia and West Virginia, debt coverage requirements on Appalachian's outstanding debt, and a

position taken by intervenors, Appalachian Research and Defense Fund, Inc., and Mercer County Economic Opportunity Corporation (Appalred and EOC), purportedly on behalf of residential customers, whereby these intervenors argue to the effect that the rate block levels create an undue rate discrimination against those residential customers who do not purchase relatively large amounts of electricity.

Of all the briefs filed, the staff brief is the only one to attempt to come to grips with most, but not all, of these issues. The briefs on behalf of Appalachian Power Company did little more than argue that the utility should be allowed to get the full rate increase it asked for. The brief filed on behalf of FMC Corporation did little more than argue that Appalachian Power Company should get none of the increase it asked for, with a possible decrease for the future. Certain coal interest intervenors filed no brief. The brief of Appalred and EOC, who call themselves "Residential Intervenors," suggests a problem of rate design superimposed upon the problems of costs in determining allowable revenue increases. However, this brief provides no definitive suggestions of how to meet their challenge.

Thus, the Commission must necessarily start its discussion of this case and make its determination in an aura of conflict and extremes, a stale record, a multiplicity of issues and with little argument cited to the record on the myriad of detail which it must sift and resolve.

Test Year

The rate filing made by Appalachian was based on a test year of 1970. The rates became effective, subject to

refund, July 29, 1971. The case was heard in mid-1973 on this basis.

The purpose of the "test-year" technique in ratemaking is to set a specific time frame for determining rate base, cost of service, and revenues. Judgmental adjustments are made to actual experience during the test year based on known and measurable changes occurring within the test year and a short time thereafter. The purpose of these adjustments is to reflect a cost-revenue relationship which will be typical of a company's operations beginning with the date the new rates become effective as approved. As a general rule, *no* adjustments to specific cost components of rate base or cost-of-service will be made which are not known and measurable at the time of the hearing. Likewise, *no* such adjustments will be allowed for known and measurable changes to specific cost components which occur too long after the end of the test year. This is particularly true in circumstances such as exist with Appalachian Power Company, where the utility is in a state of substantial growth. However, in cases where there has been a substantial regulatory lag, known and certain facts as they exist at the time of a rate decision may be used by the Commission in its overall judgment in deciding the rate to be approved, so long as such post-test year facts are of record or are of general knowledge. *Re: Hope Natural Gas Company* (1961), 40 PUR 3d 1. The Commission cannot set rates on the basis of adjusting a fragment of costs which occurred too long after the end of the test year without distorting the representativeness of the test period. This Commission has made adjustments for occurrences nine months after the end of the test period. *Re: Cabot Corporation* (1961), 41 PUR 3d 59. The rates here under consideration were made tentatively effective on July 29, 1971, almost seven months after the

end of the test period. The Commission is bound by the record made in this case on a 1970 test year in the application of these principles in the determination of rate base, rate of return, allocation and adjustments to cost-of-service for rates to be allowed and refunds to be ordered from and after July 29, 1971. In the event that this decision and order is unduly harsh to Appalachian Power Company because of events of late 1971 through 1974, so as to be contrary to the best interests of Appalachian's customers, the utility has available to it one of several alternate modes of relief available under our controlling statutes and regulations to spread the facts of the lag period upon the record.

Jurisdictional Allocations

Appalachian Power Company renders a variety of electrical services to various classes of customers in Virginia and West Virginia. As of December 31, 1970, it served 294,000 customers located in West Virginia, which is over 52% of its then total of 560,000 customers. It has substantial facilities in both States and in Tennessee. Its sales of electricity are at retail and wholesale, only a portion of which are subject to the rate jurisdiction of this Commission, while the remainder is subject to the rate jurisdiction of Virginia and the Federal Power Commission.

In this complex, allocations are necessary so that West Virginia ratepayers subject to our jurisdiction will only pay a fair, just and reasonable portion of the costs of the total integrated system of Appalachian Power Company.

Allocations of costs involve judgments in a myriad of facts. It has no claim to an exact science. Yet one of any number of valid cost allocation methods cannot be

arbitrary in the classification of costs, since such exerts a direct control over the amount of costs included in jurisdictional sales in West Virginia. This necessary tool in ratemaking can assign greater or lesser costs to West Virginia customers on two equally valid allocation methods used in this case. The issue was treated as relatively insignificant in the briefs of Appalachian and the staff. Appalachian represents that its allocation method should be used instead of the staff's method because of the availability of data to the Company and because the Company method has been accepted by this and other Commissions in the past. *Re: Virginia Electric and Power Company*, Case No. 7515, 61 ARPSCWV , (1974). (Citations to "ARPSCWV" are to the published Annual Reports of this Commission.) Therefore, to confine the number of contested items, the Commission adopts the cost allocation method of the Company ("Twelve Month's Average Peak Coincident Demand"), noting that in the circumstances of this case a cost allocation method which is influenced by end-of-test year data is preferable of two acceptable methods of cost allocation.

Rate Base

Appalachian urges the Commission to adopt a "year-end" rate base rather than an "average" rate base, because of inflation, construction projects, and investments in pollution-control equipment. The Commission rejects this departure from its precedents of long standing and adopts its staff's approach on the basis of a 13-month average plant, plus certain specified adjustments, for several good and urgent reasons supported by the record. *Re: West Virginia Water Company*, Case No. 6742, 58 ARPSCWV 158 (1970), and Case No.

6878, 59 ARPSCWV 162 (1971). In addition, the Company advocates inclusion in the rate base of construction work in progress, future construction, investments in pollution-control equipment, and coal lands. The Commission will treat each of these matters individually.

Starting with the staff estimate of $540,978,592 for Rate Base-Adjusted of the total Company, the Commission here exercises its judgment and discretion to make and to refuse to make certain adjustments to rate base on specific items.

(1) **Blue Ridge Project**

Appalachian seeks an allowance of $12,272,073 in its rate base for expenditures made in connection with the proposed Blue Ridge pumped storage generating facility. The Federal Power Commission has only recently licensed this project, effective as of January 2, 1975. It will take several years even after construction begins before the project is completed. Approximately $2,250,000 of this amount consists of land held by Franklin Realty Company and the balance of approximately $10,030,000 has been lodged by the Company in its Construction Work in Progress account, including approximately $2,425,000 in interest charged to construction. This plant is not under construction, and expenditures made in behalf of planning and litigation involving the project have been booked by the Company as Construction Work in Progress, including a substantial allowance in interest charged to construction. The Commission will allow no part of these costs in the rate base because the project is subject to considerable opposition and may never be permitted to be constructed. Thus, the expenditures made in the Blue Ridge

project may never be used and useful to the utility's customers, and in that posture, are part of the utility's risk of doing business to be absorbed in its allowable return over the years prior to its dedication to public service, if at all.

(2) **Pollution Control Equipment**

The utility also seeks approval of the Commission to include in its rate base the amount of $43,894,747 for pollution control equipment. The Company had actually spent about $16,500,000 of this amount booked in its Construction Work in Progress account at the end of the test year, with "commitments" made for the balance of the expenditure. These expenditures had been and are being made by Appalachian in compliance with State and Federal environmental requirements. Although "commitments" made for future expenditures are not allowable costs, we believe that allowance of that portion which had been expended by the utility before the end of the test year is a proper allowance. In the first place, pollution control equipment is non-revenue producing, but does cause substantial costs to be incurred. In the second place, Federal and State laws have required that the environment be cleaned up according to their standards for the public good. The fact that environmental requirements are costly cannot be brushed aside as if the costs do not exist. We will, therefore, make an allowance in the rate base for this purpose in the amount of $16,500,000.

On December 30, 1974, the Attorney General of West Virginia wrote a letter to this Commission requesting it:

> ". . .to investigate the propriety of the inclusion of the original cost of pollution control facilities and the attendant tax cost matter in the rate base submitted by a public utility when that same public utility is

receiving, at the same time, preferential tax treatment pursuant to the provisions of Article 6A" (of Code Chapter 11).

The Attorney General's letter further stated that he believed that any public utility in this State which is given preferential tax treatment as a result of the installation of pollution control facilities:

". . .should not at the same time be permitted to use the full cost of those facilities and the cost of taxation of such facilities as a basis for rate increases which will ultimately be borne by the consuming public."

We will treat the Attorney General's letter as a request for clarification of the matters he raised. Two points are to be made: First, Code Chapter 11, Article 6A, Section 3, not only saves the utility the cost of ad valorem taxes on all but the salvage value of pollution control facilities in its cost-of-service, but also saves the consuming public the same savings. This is so because, if the utility had to pay higher ad valorem taxes on the pollution control facilities, the ratepayers would be obliged to pay for these higher taxes in the utility's cost of service. As it is, both utility and consumer are given a benefit. Second, in order for the utility to construct pollution control facilities, it must raise the money to do so from the investing public. It cannot count on the ad valorem taxes it did not have to pay. It is the governmental taxing authority which collects less tax revenue from the utilities on the pollution control facilities than would otherwise be collected. This is done because the public requires the benefits to the environment and the anti-pollution facilities are non-revenue producing to the utility while being cost-incurring to the utility.

As with *all* costs of a utility, the consuming public pays them. However, the thrust of the Attorney General's tentative conclusion that a utility should not be permitted to seek a rate increase to recover the full cost of pollution control facilities is based upon an apparent misconception. If the utility gets money from investors to construct such facilities, it must pay the money back to the lenders with interest or pay dividends to its stockholders, or it will not be able to raise any more money from the investing public. Its rates must be high enough, not only to cover the operating and maintenance expenses of the anti-pollution facilities, but also to pay the costs of the capital invested. To prevent this would be confiscation of the investors' money and illegal. The investors as a class do not gain from the facilities which do not increase the utility's capacity to serve. It is the public as a whole that demands environmental controls. Thus, it is only just that the consuming public pay rates which will cover both the operating and capital costs of pollution control facilities.

(3) **Coal Lands**

Appalachian seeks a further adjustment to its rate base in requesting an allowance of $15,737,151 for expenditures made in the purchase of coal lands and mining equipment. Prior to the end of the test year, $4,801,668 had been expended for these items. The Commission staff used a thirteen-month average and added one-thirteenth of that amount, or $369,359, which is already included in the threshhold $540,978,592 rate base, which is subject to adjustment by this order. Although the Commission favors and would encourage an electric utility to acquire its own coal reserves for part of its fuel requirements, as being in the public interest, in this proceeding we will not allow Appalachian an adjustment to its rate base of any more of its year-end expenditure of $4.8 million than the average of $369,359

allowed. *Cf. Re: Detroit Edison Company*, 93 Pub.Util.Fortnightly, page 93; *P.S.C.* v. *Duquesne Light Co.*, 17 Pa.Sup.Ct.187,90A2d 607, which are precedents from Michigan and Pennsylvania, respectively. We treat this issue differently than the anti-pollution facilities because on the transfer of coal lands to one of its coal producing affiliates it will become revenue-producing. Having its own sources of fuel permits a utility to have an assurance of a base supply of fuel in time of fuel shortage without which it cannot serve the public. Moreover, owning coal lands puts it in a better bargaining position vis-a-vis its non-affiliated suppliers of coal. This should have a downward influence on the price of coal purchased.

(4) **Miscellaneous**

The Commission rejects the Company's request to increase the rate base by $276,352 which represents the utility's expenditures incurred by purchasing its transferred employees' houses, which the transferred employees cannot sell before they move to their new company location. This practice is a convenience to company personnel, rather than an essential element in the rendition of electric service to the public and is, therefore, not a proper item for inclusion in the rate base.

Also rejected is the Company's attempt to add to the rate base $3,782,455 for land purchase contracts for surface lands and rights of way and $196,905 for non-utility property not used or useful in its service to the public.

The adjustment for anti-pollution facilities allowed in an amount of $16,500,000 requires a concomitant adjustment to accumulated provision for depreciation of $511,500, making the negative figure of $253,884,162

increased to $254,395,662 as accrued depreciation to be deducted from the total electric plant allowed in the rate base. The Commission rejects the other adjustments to depreciation reserve urged by the Company, because such were based on year-end accumulations and a post-test year change in certain depreciation rates.

Also, the Commission adopts the staff's working capital requirements-adjusted of $21,608,484 (combining materials and supplies, prepayments, allowable cash equal to one-eighth of operation and maintenance expenses-pro forma), subject to an additional adjustment because of the anti-pollution equipment allowance of $82,500, so that the allowable working capital allowance will total $21,690,984. The Commission adopts the staff calculations as to working capital because it properly excluded cost of purchased power and non-utility material and supplies and determined that merchandise on hand be deducted from materials and supplies on the basis of average test-year figures rather than year-end amounts.

(5) **Accumulated Deferred Income Taxes**

The foregoing adjustments to reflect the allowance of anti-pollution facilities costs are as follows:

Total Rate Base—Adjusted	$540,978,592
Anti-Pollution Facilities:	
Plus—Plant	16,500,000
Less—Accumulated provision for depreciation	(511,500)
Plus—Working capital allowance	82,500
Tentative Adjusted Total	$557,049,592

However, the original $540,978,592 was derived after deducting $35,412,718 which represents the test-year average of balances in the "Earned Surplus Restricted for Future Federal Income Taxes" account. This $35,412,718 was generated from two sources of tax deferral:

(a) $26,560,718 is the portion accumulated as a result of tax deferrals due to accelerated amortization on emergency facilities over a five-year period, under Section 168 of the Internal Revenue Code, with the tax deferrals being amortized by the Company over a longer period of time;

(b) the balance of $8,852,000 is the portion accumulated prior to 1958, attributable to liberalized depreciation under Section 167 of the Internal Revenue Code, with the tax deferrals being built up and becoming tax savings as to growth companies such as Appalachian.

It is the decision of this Commission that the West Virginia portion of the $8,852,000 tax savings, or $4,090,314, attributable to liberalized depreciation associated with pre-1958 normalization of depreciation accruals be deducted from the rate base. However, the portion of the $26,560,718 tax deferrals attributable to emergency facilities allocated to West Virginia, or $12,273,132, is permitted to remain in the rate base, but assigning to it a zero rate of return, because the same is considered contributed to the utility by its ratepayers and has been invested in the business.

Thus, using the Company's apportionment of the resultant $583,610,310 total Company rate base to West Virginia retail operations, the West Virginia rate base is found to be as follows:

Utility Plant in Service	$381,118,985
Accrued Depreciation	(116,457,346)
Net Plant	$264,661,639
Electric Plant Held for Future Use	378,977
Contributions in Aid of Construction	(938,430)
Working Capital	9,910,827
Deferred Federal Income Tax Savings	(4,090,314)
West Virginia Rate Base	$269,922,699

Rate of Return

A rate base and rate of return are significant in ratemaking only when an allowable rate of return is applied to the rate base determined in order to obtain a product which represents allowable earnings, subject to increase to recover income taxes associated with such return. The allowable earnings are needed to retire debt, pay interest and dividends, and otherwise to be used in the business for construction or working capital. Such allowable earnings should also be adequate to permit the utility to finance necessary expansion.

As stated before, the record of this case is confined to a 1970 test year with minimal adjustments for known and measurable changes occurring for a short period of time after the end of the test year.

The rate-of-return evidence in this case shows a Company weighted cost of capital of 8.93% compared with a staff range of rate of return of up to 8.03%. Although an allowable rate of return is a transient tool in ratemaking and unique to each particular company with its own capital structure and character of operations, it is useful to note that the highest rate of return heretofore allowed by this Commission was 8.76% on a utility capital structure as of December 31, 1972. *Re: C. & P. Telephone Company of West Virginia*, Case No. 7496, issued June 24, 1974. It is true that the starting point for determining a fair, just and reasonable rate of return to be applied to an allowable rate base is the cost of capital based on the evidence. However, cost of capital is just one of several elements to be considered in making a factual finding on rate of return. Some of the other factors to be considered, particularly in the instant case where the decision is being made approximately four years after the end of the test year, are as follows:

trends in debt and equity financing; growth of capacity and anti-pollution facilities; inflation and other elements of risk, such as Appalachian's Blue Ridge project, governmental action or inaction, and the effects on load growth because of energy use, conservation measures and possible changes in rate design to relieve the plight of the disadvantaged. The informed judgment of this Commission is based on the record and public records required to be filed with this Commission pursuant to law and its regulations.

The cost of capital evidence presented by the staff and Appalachian shows substantial agreement on the weighted cost of debt and preferred stock of from 4.68% to 4.73%. Also, it shows a major difference of opinion as to the cost of common equity capital, ranging from 11.00% (staff) to 14.20% (Appalachian). However, the weighted average cost of money will be discussed in this opinion only in terms of the percent of capitalization after applying a zero cost of capital to the portion of "Earned Surplus Restricted for Future Federal Income Taxes" resulting from tax deferrals due to amortization on emergency facilities under Section 168 of the Internal Revenue Code, which was not deducted from the rate base.

Using the capital structure as of December 31, 1972, presented by Appalachian in its Exhibit No. 30, and adjusting it to reflect our decision on Federal Income Tax deferrals, the percent of capitalization is adjusted to be as follows:

	Percent of Capitalization	Cost of Capital
	%	%
Debt	59.85	6.72
Preferred Stock	8.73	6.44
Deferred FIT	2.22	0
Common Equity	29.20	11.00 to 14.20
	100.00	

Applying the appropriate factors to the Company's cost of debt and preferred stock results in weighted cost of such capital of 4.02% plus 0.56%, or 4.58%. Deferred FIT is excluded entirely from the weighted cost of capital. Common equity is considered in a different perspective. The Commission considers the range of cost of common equity capital of from 11.00% to 14.20% without deciding any particular mathematical mix of the resultant weighted costs of common equity capital as binding on this Commission in reaching its conclusion on rate of return in this or any future case involving Appalachian Power Company. The evidence of past cost of common equity capital, by its very nature, does not lead to a precise finding of a prediction of today's cost of common equity capital to Appalachian Power Company. This evidence is acceptable proof, however, of a range of cost data to be considered with other elements in determining the allowable rate of return.

Thus, the Commission here finds on the basis of the record and its informed judgment that the allowable rate of return for Appalachian in determining its just and reasonable rates, to be effective on and after July 20, 1971, is 8.73%.

Applying this rate of return to a 1970 test year-adjusted rate base for West Virginia of $269,922,699 produces an allowable return of $23,564,252.

Adjustments to Operating Revenue Deductions

Both the utility and staff agreed that the per books total company operating revenue deductions were $146,362,395. However, both would make certain adjustments to the per-book cost items to take care of known and measurable changes in such costs in order to reflect a representative matching of costs to projected

test-year revenues to set rates for the period beginning July 29, 1971.

As discussed above, the Commission's starting point indicates a substantial difference between the staff and the Company on a total Company basis as to allowable adjustments in the magnitude of over $5,839,208. This is prior to allocation to West Virginia. The utility seeks a net aggregate upward adjustment of $6,598,000, while the staff recommends an overall net adjustment of $758,792. The Commission will discuss its allowance or disallowance of these operating revenue deduction adjustments by specific cost components, with the net effect of allowing a total adjustment of $1,639,421 to the total Company cost of service. The West Virginia apportionment of such costs, on the basis of the Company's method of allocation amounts to $69,267,529, including depreciation expense.

Each adjustment to specific cost components will be discussed below:

(1) **Salary and Wage Adjustments**

Appalachian presented evidence projecting going-level salary and wage adjustments of $2,227,000. This included not only the annualization of wage increases effective during the test year, but also an estimate for anticipated increases to be granted after the test year. Furthermore, the utility's exhibit reflects going-level increases in labor related expenses, such as pensions and insurance, based on said estimated salary and wage increases.

The staff accounting exhibit, on the other hand, reflected going-level adjustments to salary and wage expenses and other labor related expenses only to the extent that such adjustments annualized increases were

actually experienced throughout the test year. The record indicates that while the out-of-test period wage increases projected by Appalachian were tentatively scheduled at the time its accounting exhibit was prepared, the wage increases were later prevented by the effect of Federal wage controls and were not actually experienced as estimated. Therefore, we will not allow these post-test year wage adjustments, but will accept the wage increase adjustments and associated benefits as were included in staff's Exhibit No. 2, which total $1,535,636.

(2) **Contract Labor for Maintenance**

Appalachian's evidence projected a going-level increase to contract labor which included additional tower painting expense of $69,300, tree trimming and brush control of $739,000 and pole treatment of $274,000. The record revealed that these adjustments are the result of Appalachian's estimation of what a "normal level" of expense should be for each of these expense items. However, the evidence shows that Appalachian imputed a so-called "normal level" which was considerably higher for these expenses than either the actual test-year expense or an average expense based on the years 1967 through 1970.

The staff increased the test-year tower painting expense by $33,913, tree trimming and brush control by $164,247 and pole treatment by $169,461, which represented additional expense computed when using a four-year average of actual expenses as compared to the actual test-year expenses for these cost components. The averaging method is consistent with past decisions of this Commission in its treatment of expense items of this nature and, therefore, the Commission will allow the increases as were included in staff Exhibit No. 2, including an adjustment of $79,408, to annualize contract

labor rates which were increased during the test year. The aggregate of the costs allowable in these contract labor cost items is $447,029.

(3) **Materials and Supplies**

Appalachian projected an adjustment of $92,000 to its book expenses of materials and supplies upon the basis of an estimate based on economic indicators rather than a normalization of increases in the test-year level of expenses. We will not allow this adjustment for the purpose of developing a cost of service in this proceeding, noting, however, that inflationary trends are taken care of in the circumstances of this proceeding by a higher level of the rate of return allowed by the Commission than would otherwise be the case in the absence of inflation.

(4) **Public Affairs**

Appalachian's adjustments would increase its public affairs expenses by $122,000 and sales Department expenses by $797,000. Again, these were estimates which were made on the assumption that the actual expenses for the test year in these classifications should be higher to be representative. The staff found no known or measurable changes after the end of the test period which would suggest any adjustment to these expenses. The record reflects that the level of sales expense actually decreased in 1972. A review of the utility's Annual Reports to the Commission shows that sales expenses 1971-1973 have continued to decrease. Therefore, we will not allow any adjustments to the test year costs for public affairs and sales department expenses.

(5) **Operating Expenses Associated with Anti-Pollution Facilities**

Appalachian's presented evidence seeking an adjustment of $1,332,000 for estimated future expenses in operating air and water pollution equipment, composed of $1,282,000, by applying a factor of four percent (4%) to Appalachian's estimate of total capital costs of air pollution equipment and an estimate of $50,000 as cost for operation of water pollution equipment. While staff made no such adjustment in its evidence, the Commission makes an allowance for this expense to be consistent with our inclusion in the rate base of certain actual costs incurred by the Company for pollution control equipment. Therefore, we will allow an additional $660,000 for anticipated operation and maintenance expenses associated with that equipment consistent with the evidence presented by the Company at 4% of our allowance of $16,500,000 actually expended on pollution control facilities.

(6) **Postage and West Virginia Gasoline Tax**

Both Company and staff included in their respective accounting exhibits going-level adjustments for annualization of increases in postal rates and gasoline taxes during the test year. There is little difference between Company's and staff's adjustments. We allow staff's adjustment of $102,687 for increased postage and $3,645 for increased gasoline taxes.

(7) **Rate Case Expense**

In the matter of rate case expense, it has been the position of this Commission that such expense is properly chargeable to the rate-payers over a reasonable amortization period. Appalachian proposes to include the total estimated cost of its rate cases of $200,000 in operating expenses. The Commission will follow its

established policy of not allowing rate case expense to be charged off in one year and will, therefore, allow an adjustment of $66,667 derived from an amortization of rate case expense over three years.

(8) **Service Corporation Billings**

A contract between Appalachian Power Company and its affiliate, American Electric Power Service Corporation, exists whereby certain specialized services are rendered at cost to Appalachian. This contract has previously been approved by this Commission. The Company requested an upward adjustment of five percent (5%) of the actual cost. No adjustment for this expense item is allowed because a mere increase in revenues in the test year due to the filing for higher rates is not adequate proof that actual test-year expenses for this cost item are not representative of a normal cost level. The Company's going-level adjustment of $173,000 to service corporation billings includes increases in service corporation charges subsequent to the end of the test year ended December 31, 1970. In keeping with decisions made with regard to similar items in this order, we will not allow this increase.

(9) **Depreciation Expense**

Since the Commission has rejected the Company approach for a year-end rate base with projected future plant, it is not necessary to discuss the Commission's rejection of the utility's consistent adjustment of depreciation expense. However, the utility made an additional adjustment to reflect a *lowering* of depreciation rates effective after the end of the test year, which would reduce depreciation expense by nearly $400,000. The Commission will make no adjustment on the basis of

post-test year changes in depreciation rates. The Commission does, however, make an adjustment to depreciation expense by adding $511,500 to reflect depreciation at a rate of 3.1% of the adjustment for the inclusion of the adjustment for actual cost of anti-pollution facilities allowed in the rate base.

(10) **Adjustments to Base Fuel Costs**

The Commissions's staff reduced fuel costs by $755,005 to eliminate interest charges on delayed coal bill payments. The Commission agrees that this amount is not properly chargeable to operating expenses and will, therefore, adopt the staff adjustment.

Further, the staff reduced fuel costs by $61,778 to reflect an understatement of coal on hand at December 31, 1970, resulting in an overstatement of test-year fuel costs. The Commission adopts this adjustment by its staff as proper.

(11) **Taxes other than Income Taxes**

Appalachian made going-level adjustments to taxes other than Federal income tax in the amount of $963,000 in its evidence. Staff Exhibit No. 2 also reflected numerous tax adjustments which totaled $475,706. However, $8,363 of this amount was an adjustment to Account 501-Fuel Expense, and is allowed in that account, but is not shown as an adjustment to taxes. With this correction, the Commission adopts the staff tax adjustments aggregating $467,343 for the following reasons:

Appalachian improperly added back capitalized taxes during the test year in the amount of $224,060, and an adjustment by staff to reduce property taxes by $158,167 more than respondent's adjustment. In the matter of capitalized taxes, the Commission has consistently allowed the inclusion of capitalized taxes in

rate base whenever the applicable construction work is completed. Since the rate base includes a component of capitalized taxes, it would be improper to allow test-year capitalized taxes to be added back as an item of operating expense.

The problem of property tax assessments being based on property values at some date earlier than the end of a test year is not new to this Commission. In keeping with prior decisions, we have adopted here the actual property tax paid during the test year. In view of the fact that the staff adjustments relating to capitalized taxes and property taxes are in keeping with the above-stated principles, the Commission has here adopted the staff adjustments to taxes, other than FIT, totaling $467,343, and the adjustment to Account 501 of $8,363.

The aggregate of these going-level operating revenue deductions of $2,986,087, together with other resultant components of the cost of service resulting from a pro forma adjustment to calculate allowable Federal income taxes, is allocated so as to apportion $1,181,691 to West Virginia.

Debt Coverage

Appalachian Power Company and staff witnesses agree that the utility's debt service coverage is a very serious problem. The problem is one that affects the ability of the utility to raise new money to finance its expanding capacity-producing and anti-pollution facilities and operations. The solution of this problem is made more complex because of the staleness of the evidentiary record. The record will only permit a coverage test on the basis of a 1970 test year, and the Company has carried on its financing in 1971-1974 in the face of

contingent revenues being collected in West Virginia, subject to refund and a lack of rate relief having been achieved in Virginia.

Thus, to arrive at the reasonableness of the rates allowed in this decision by use of a debt coverage test, the Commission must, of necessity, turn to the Annual Reports for 1972 and 1973 filed by Appalachian with this Commission. Appendix A-1 to this decision and order reflects a comparison of debt coverage ratios, both with and without the effect of the full rate increase requested by Appalachian in this proceeding.

The comparison shows that if Appalachian were denied any rate relief at all in this proceeding, its year-end debt service coverage would have been inadequate in 1972 (1.93) and 1973 (1.99), because the number of times its interest on long-term debt is covered by its earnings would be less than 2.00 times. On the same comparison, the other extreme is shown in that its actual annual debt service coverage was adequate in 1972 and 1973 because its debt service coverage was 2.23 and 2.08. These coverages are calculated unaudited with revenues which exclude contingent revenues which are not allowed as a result of this order, and which must be refunded pro rata to the West Virginia customers of Appalachian. However, the debt service coverage calculations based upon the 1970 test year adjusted to the revenues allowed by this final order show coverage ranging from 2.00 to 2.49, depending upon the use of actual annual interest or year-end interest annualized. Thus, a finding can be made that the rates allowed by this order are the lowest possible reasonable rates allowable under that test. Moreover, since total company figures are used in a period of time when the utility had no request for rate relief pending in Virginia, it follows that

the 2.00 to 2.49 times test-year coverage would have been improved if Appalachian had been realizing additional revenues in Virginia. Since it did not seek rate relief in Virginia during this period, it must have been satisfied with a debt-coverage ratio which ranged above 2.00 times. Since Appalachian did raise new money in 1972 and 1973, it can be assumed that the debt-coverage test complied with SEC requirements and the Company's Debenture Agreement. The Commission finds that the revenues allowed by this Commission in this case are just and reasonable on the basis of the debt-service coverage test. There is no data available to the Commission upon which it can base a finding that the rates allowed by this order will not permit Appalachian to raise new money at the present time. The utility's current operations and rate base are too far beyond the end of the 1970 test year used in this proceeding to be useful to correct present deficiencies in revenues, if any, from its West Virginia customers. If Appalachian's present growing pains in an inflationary period of our country's economy are made more acute by the results of this decision and order, the Company has available to it adequate remedies under Chapter 24 of the West Virginia Code and the regulations of this Commission.

Rate Level Apportionments

Intervenors, Appalachian Research and Defense Fund, Inc., and Mercer County Economic Opportunity Corporation, filed a joint petition to intervene on behalf of "low-income" customers of the electric utility. In addition to matters considered and decided in other parts of this decision and order, these intervenors suggest that the existing rate structure of the utility is discriminatory, presumably against "low-income" customers.

The brief of intervenors points up the obvious fact that the rate steps of the utility's rate schedules are designed to promote the use of electrical energy by each customer under various classes of service. A glance at Appendix A-2 to this decision shows that the rates filed in this case have the highest rates in the first blocks with a descending series of rates in each of the succeeding blocks. As a result, the more electrical energy that is purchased, the lower will be the unit cost of such purchases because of the effect of averaging. However, the total revenues paid by each of these large users will be more than paid by each of the smaller users.

The intervenors suggest that this creates rate discrimination against smaller users. However, there is no proof of this in the record. The intervenors presented no evidence to show a fair apportionment of demand and energy costs or of fixed, variable or mixed costs to each block of the rate schedules. The Company spread its rate increases over the steps of the various rate schedules by giving greater increases in the first usage blocks in descending increments, even though the higher usage blocks took a greater percentage increase. (See Appendix A-2.) The Company's purpose was "to ask all customers to share equally in the increased revenue" sought in this case. This position of the Company is not contested by the parties on the basis of the record. The intervenors seem to argue that little or none of the rate increase should be placed in the first 600 KWH per month usage in order to benefit the low-usage customer.

The Commission can take administrative notice of the plight of the poor and the frustrations of the fixed income, low-usage customer. We sympathize with the economic pressures on these citizens in a time of inflation.

However, because of the inadequacies in the evidentiary record, due to a failure on the part of the intervenors to come forward with adequate proof to support their allegations of rate discrimination, the Commission—in this opinion—will do no more than outline the complexities of the problem and require the utility to furnish certain data for use on the earliest occasion in which rate design may be properly considered on an adequate evidentiary record.

Of all the tasks involved in the artful science or the scientific art of ratemaking, rate design is the most difficult and troublesome. As we have seen, the many steps taken in ratemaking thus far—determination of rate base, rate of return, adjustments to cost of service, and allocations to jurisdictions—are intricate and detailed, but they are determined with a reasonable degree of rationality and precision. However, in contrast, the job of spreading a revenue deficiency over several classes of ratepayers, or deciding *who* is going to pay what rate or rates, depends on a consideration of a far broader spectrum of circumstances to reach a balance and a fairness that can be recognized as distributive justice. Any rate increase at all will be unpopular. The question is—are the rate increases fair, just and reasonable, and not *unduly* discriminatory?

The broad scope of rate design subsidiary issues are set forth in a recent administrative decision of the California Public Utilities Commission. *Re: Southern California Edison Company* (1973), 100 PUR 3d 257, 297-305. To set a good rate structure, the rates should have the following attributes:

1. Rates should produce the revenues required for the utility to operate its business.

2. Rates should be simple and easy for the customers to understand.

3. Rates should promote stability in revenue flow over the annual operating period.

4. Rates should be based upon a fair apportionment of cost of service to jurisdiction, to classes of customers and both to use and availability to use.

5. Rates should discourage wasteful use.

6. Rates should not be so high in any category or class that it would force the blessings of electrical service to be economically out of reach of the poor or to lose the benefits of high usage which redound to the benefit of all, including the disadvantaged.

7. Rate changes should not be abrupt or arbitrary in departing from historical levels of rates because both utility and its classes of customers have geared themselves to the rates as they have been in effect, and to destroy this relationship without good cause would do violence to the maintenance of good faith between the utility and its customers.

Thus, in short, any change in rate design must be considered in its direct effects on the ratepayers who pay under a particular rate design and in its indirect effects upon the other ratepayers who must share any shift of revenues from a particular class of customers or level of usage within that class.

The most cogent example of the effects of an abrupt change in rate design has come about by the fuel adjustment clause which passes on to the electrical customers the higher costs of fossil fuel to the utility in the form of an incremental increase "made on the actual KWHrs billed." Without discussing the rate design features of

the energy surcharge in this opinion, it is obvious that the magnitude alone of this additive to substantially all of the bills of Appalachian's customers has created problems.

All of these many interrelated difficulties must be fully considered by this Commission on an evidentiary record. This opinion and order is but the first step in the reasoned solutions in the public interest.

SUMMARY

The specific items of cost and revenue considerations discussed and decided above are summarized in Appendix A-3 to this decision. In summary, we find that the test-year cost of service of Appalachian Power Company allocated to its West Virginia jurisdictional customers is $92,831,781. A comparison of test-year revenues from West Virginia jurisdictional sales total $91,510,259 at the going level, indicating a total deficiency in revenues of $1,321,522. Therefore, we will order Appalachian Power Company to file lower rates in conformity with the foregoing decisional findings and conclusions set forth in this decision and order.

FINDINGS

1. The Commission finds that the rates and charges set forth in Appalachian Power Company's Tariff P.S.C. W.Va. No. 2 issued February 3, 1971, and put into effect July 29, 1971, by terms of West Virginia Code, Chapter 24, Article 2, Section 4, are unjust and unreasonable for the reason that they would produce more revenues than are necessary to enable Appalachian Power Company to pay its reasonable and necessary operating expenses, taxes, and depreciation, and earn a

fair return on its property used and useful in its public service business in the State.

2. The Commission makes no finding in this case on the issue of whether or not the "Fuel Clause" contained in the various rate schedules in said Tariff P.S.C. W.Va. No. 2, as amended by order issued in this proceeding on September 16, 1974, is unjust and unreasonable or unduly discriminatory, but defers its findings and orders with respect to said "Fuel Clause," as amended, to its forthcoming decision and order in its Case No. 7945, styled *Investigation of fuel adjustment clauses of electric utilities, proceeding upon the Commission's own motion.*

3. The Commission finds that intervenors, Appalachian Research and Defense Fund and Mercer County Economic Opportunity Corporations, did not sustain their burden of proof on the issue they raised asserting that the historic rate design of the various rate schedules filed by Appalachian Power Company were unduly discriminatory to the detriment of the utility's low-usage customers.

4. The Commission finds that the rate design of the various rate schedules filed by Appalachian Power Company adjusted to levels which would recover the cost of service allowed in this decision and order and which are designed to spread any basic rate increases equally over all classes of customers is just and reasonable and is not unduly discriminatory in setting rates to be effective and refunds to be made as of and after July 29, 1971, to the date of this order, but that such rate design is a proper issue to be raised and determined on a proper record at any evidentiary hearing that may be held subsequent to the date of this order affecting the rates of Appalachian Power Company for the period beginning with the date that any new base rates higher than those allowed

herein may be put into effect by proper order of this Commission.

5. The rates and charges hereinafter ordered to be prepared and filed in superseding rate schedules, to be effective from and after July 29, 1971, in accordance with the principles and conclusions set forth in this decision and order, are just and reasonable and are not unduly discriminatory.

ORDER

1. The tariff sheets filed with the Commission by the respondent, Tariff P.S.C. W.Va. No. 2, issued February 3, 1971, are hereby cancelled and stricken from the tariff files of the Commission.

2. Appalachian Power Company is ordered to file revised sheets for all of its P.S.C. W.Va. No. 2 tariff schedules, which will be effective on and after July 29, 1971, containing first revised sheets where appropriate which set forth reduced rates and charges under the rate design used in its filing on February 3, 1971, at levels which are only high enough to recover the 1970 test-year deficiency of $1,321,522, over the revenue level of the 1970 test year. These revisions should be filed within ninety (90) days of the date of this order for approval by this Commission as to their conformity with the findings and conclusions stated herein.

3. Respondent shall refund to each of its customers within sixty (60) days of the date of this order the difference between the amount collected under said Tariff ordered to be cancelled and stricken hereby and the rates and charges herein ordered to be filed and approved by this Commission before being finally put into effect as of July 29, 1971, with interest at the rate of six percent

(6%) per annum from the time collected to the date of the refund, and shall promptly report such refunds to the Commission.

4. Respondent is ordered to file with this Commission, for informational purposes only, and in preparation for any subsequent hearing on the rate design of Appalachian Power Company's rate schedules, pro forma rate-levels in each of the steps in its various rate schedules which would spread the additional revenues allowed herein of $1,321,522 over all of the steps of each rate schedule other than the first step, *except* for the following: C.P. (Capacity Power—Wholesale), L.P.O. (Large Power—Optional), L.C.P. (Large Capacity Power), I.R.P. (Interruptible Power), H.L.P. (High Load Factor Power), and T.P. (Transmission Power), in which excepted tariffs all steps would be increased.

A Copy.

Teste:

S. GROVER SMITH, JR.,
Secretary

APPENDIX A-1

APPALACHIAN POWER COMPANY

Comparative Statement of Interest Coverage Based on Adjusted Test Year in Case No. 7083 and Utility's Annual Reports to the West Virginia Public Service Commission.

	Year Ended 12-31-70 Adjusted	Years Ended 12-31-72	Years Ended 12-31-73
Times Interest Earned on Actual Annual Interest			
Test year at going-level adjusted for decision in Case No. 7083	2.49		
1972 and 1973:			
Including revenues collected under bond		2.55	2.38
Excluding revenues collected under bond		2.23	2.08
Times Interest Earned on Annualized Interest on Debt Outstanding at End of Year			
Test year at going-level adjusted for decision in Case No. 7083	2.00		
1972 and 1973:			
Including revenues collected under bond		2.21	2.27
Excluding revenues collected under bond		1.93	1.99

APPALACHIAN POWER COMPANY
(Total Company)

Comparative Statement of Interest Coverage Based on Adjusted Test Year in Case No. 7083 and Utility's Annual Reports to the West Virginia Public Service Commission.

	Year Ended 12-31-70 Adjusted	Years Ended 12-31-72	Years Ended 12-31-73
	$	$	$
Operating Revenues	200,535,053	263,088,795	291,525,663
Operating Revenue Deductions:			
Operating Expenses	103,334,035	122,007,430	140,203,734
Depreciation	23,634,187	32,687,028	36,260,624
Taxes other than income tax	18,124,537	24,599,147	21,359,192
Total	145,092,759	179,293,605	197,823,550
Defined Earnings—Operating	55,442,294	83,795,190	93,702,113
Non-operating Income (up to 10% defined earnings—operating)	5,544,229	8,335,345	9,370,211
Defined Earnings	60,986,523	92,131,035	103,072,324
Interest on Long-Term Debt (actual annual interest)	24,453,753	36,159,927	43,397,694
Annualized Interest on Long-Term Debt Outstanding at End of Year	30,484,898	41,606,629	45,451,511
Effect of Eliminating Revenues Collected under Bond			
Defined earnings—operating		83,795,190	93,702,113
Less revenues collected under bond		(11,156,000)	(12,120,000)
Add B&O tax effect @ 4.88%		544,413	591,456
Adjusted defined earnings—operating		73,183,603	82,173,569
Add allowable non-operating income		7,318,360	8,217,357
Adjusted defined earnings		80,501,963	90,390,926

APPENDIX A-2
APPALACHIAN POWER COMPANY
Comparison of Rates in Effect Under Bond in Case No. 7083 With Rates Prior to Case No. 7083

	Prior Rates	Rates Filed in 7083	Increase	Percent Increase
	¢ per KWH	¢ per KWH	¢ per KWH	%
Tariff C.L.P. (Combined Light & Power)				
Primary (50 x capacity)	4.15	4.70	.55	13.25
Secondary (Excess over Primary)				
First 5,000 KWHrs	2.13	2.47	.34	15.96
Next 5,000	1.43	1.69	.26	18.18
Over 10,000	1.33	1.58	.25	18.80
Minimum Charge	Primary	Primary		13.25
Tariff R.S. (Residential Service)				
First 30 KWHrs per month	5.0	5.3	.3	6.00
Next 40	4.0	4.5	.5	12.50
Next 130	2.4	2.8	.4	16.67
Next 300	1.5	1.8	.3	20.00
Next 1,000	1.2	1.4	.2	16.67
Over 1,500	1.0	1.2	.2	20.00
Minimum	$1.50 per month	$2.50 per month	$1.00 per month	66.67
Water Heater Service				
Last 400 KWHrs per month	1.0	1.2	.2	20.00
Tariff G.S. (General Service)				
50 x Monthly Demand				
First 30 KWHrs	5.0	5.64	.64	12.80
Over 30	3.75	4.26	.51	13.60
Next 150 x Monthly Demand				
First 3,000 KWHrs	2.4	2.76	.36	15.00
Over 3,000	1.5	1.77	.27	18.00
Over 200 x Monthly Demand	1.0	1.21	.21	21.00
Minimum Charge	$1.50 per month	$2.50 per month	$1.00 per month	66.67
Tariff C.S. (Church Service)				
First 40 KWHrs per month	5.0	5.64	.64	12.80
Next 85	4.0	4.53	.53	13.25
Next 375	2.7	3.09	.39	14.44
Next 500	1.8	2.10	.30	16.67
Over 1,000	1.5	1.77	.27	18.00
Minimum Charge	$1.50 per month	$2.50 per month	$1.00 per month	66.67

	Prior Rates	Rates Filed in 7083	Increase	Percent Increase
	¢ per KWH	¢ per KWH	¢ per KWH	%
Tariff C.P. (Capacity Power—Wholesale)				
100 x Contract Capacity:				
100 x First 50 Kva	3.14	3.59	.45	14.33
100 x next 50 Kva	2.74	3.14	.40	14.60
100 x next 50 Kva	1.74	2.04	.30	17.24
100 x next 150 Kva	1.54	1.81	.27	17.53
100 x over 300 Kva	1.34	1.59	.25	18.66
Excess of 100 x Capacity:				
First 50,000 KWHrs	1.33	1.58	.25	18.80
Next 50,000	1.23	1.47	.24	19.51
Next 200,000	1.13	1.36	.23	20.35
Over 300,000	1.03	1.31	.23	21.30
Minimum Charge	$24 per Kva	$24 per Kva	—	—
Tariff C.I.P. (Commercial—Industrial) formerly C.P.O. (Capacity Power—optional)				
First 30 x Monthly Demand	4.4	4.98	.58	13.18
Next 170 x Monthly Demand:				
First 3,000 KWHrs	2.13	2.47	.34	15.96
Next 3,000	1.93	2.25	.32	16.58
Next 4,000	1.73	2.03	.30	17.34
Next 10,000	1.53	1.80	.27	17.65
Next 80,000	1.33	1.58	.25	18.80
Over 100,000	1.13	1.36	.23	20.35
Next 160 x Monthly Demand	.74	.93	.19	25.68
Over 360 x Monthly Demand	.54	.71	.17	31.48
Minimum Charge	$2.00 per Kva	$2.00 per Kva	0	0
Tariff P.S.O. (Public School—Optional)				
All Energy	2.5	2.9	.4	16.00
Minimum Charge	$2.50 per month	$2.50 per month	0	0
Tariff E.H.G. (Electric Heating General)				
First 200 KWHrs	$6.00 per month	$6.85 per month	.85 per month	14.17
Next 6,800	1.5	1.77	.27	18.00
Over 7,000	1.2	1.43	.23	19.17
Each KW Demand in Excess of 30	$1.25 per month	$1.38 per month	.13 per month	10.40

	Prior Rates c per KWH	Rates Filed in 7083 c per KWH	Increase c per KWH	Percent Increase %
Tariff S.S. (School Service)				
First 500 KWHrs per Classroom	2.5	2.9	.4	16.00
Balance	.7	.9	.2	28.57
Tariff L.P.O. (Large Power—Optional)				
First 30 x Monthly Demand	4.4	4.98	.58	13.18
Next 170 x Monthly Demand:				
First 3,000 KWHrs	2.13	2.47	.34	15.96
Next 3,000	1.93	2.25	.32	16.58
Next 4,000	1.73	2.03	.30	17.34
Next 10,000	1.53	1.80	.27	17.65
Next 80,000	1.33	1.58	.25	18.80
Over 100,000	1.13	1.36	.23	20.35
Next 160 x Monthly Demand	.74	.93	.19	25.68
Over 360 x Monthly Demand	.54	.71	.17	31.48
Minimum Charge	$1.30 per Kva	$2.00 per Kva	$.70 per Kva	53.85
Tariff L.C.P. (Large Capacity Power)				
First 1,000 KW Monthly Demand	$3.92 per KW	4.69 per KW	.77 per KW	19.64
Next 3,000	3.43	4.14		20.70
Over 4,000	2.92	3.58		22.95
Energy in Excess of 315 KWHrs:				
Per KW Demand	.465	.63	.165	35.48
Demand Charge	.25 per Kvar	.28 per Kvar	.03 per Kvar	12.00
Tariff I.R.P. (Interruptible Power)				
Demand Charge:				
KW Demand	$.667 per KW	.738 per KW	.071 per KW	10.64
Kvar Demand	.25 per Kvar	.28 per Kvar	.03 per Kvar	12.00
Energy Charge	.386	.538	.152	39.38
Tariff H.L.P. (High Load Factor Power)				
For 34.5-69 KV Delivery Voltage				
First 67,000 KW Demand	$3.59 per KW	$4.64 per KW	$1.05 per KW	29.25
Next 33,000 KW	3.35 per KW	4.37 per KW	1.02 per KW	30.43
Over 100,000 KW	3.23 per KW	4.24 per KW	1.01 per KW	31.27

	Prior Rates c per KWH	Rates Filed in 7083 c per KWH	Increase c per KWH	Percent Increase %
For 138 KV Delivery Voltage				
First 67,000 KW Demand	$3.51 per KW	$4.55 per KW	$1.04 per KW	29.63
Next 33,000	3.30 per KW	4.31 per KW	1.01 per KW	30.61
Over 100,000	3.18 per KW	4.18 per KW	1.00 per KW	31.45
Secondary—All Voltage				
Energy in Excess of 600 KWHrs per KW Demand	.03 per KW	.44 per KW	.14 per KW	46.67
Demand Charge	.25 per Kvar	.28 per Kvar	.03 per Kvar	12.00
Tariff O.L. (Outdoor Lighting)	Per Lamp Per Month	Per Lamp Per Month	Per Lamp Per Month	
Each 7,000 Lumen Mercury	$4.00	$4.50	$ .50	12.50
Each 11,000 Lumen Mercury	5.25	5.91	.66	12.57
Each 20,000 Lumen Mercury	6.25	7.08	.83	13.28
Each 2,500 Lumen Incandescent	3.00	3.39	.39	13.00
Each 4,000 Lumen Incandescent	3.50	3.98	.48	13.71
Each 7,000 Lumen Mercury on 12' Post	4.75	5.33	.53	12.21
Tariff T.P. (Transmission Power)				
For 34.5—69 KV Delivery Voltage				
First 25,000 KVA Demand	$2.715 per KVA	3.34 per KVA	.625 per KVA	23.02
Over 25,000 Demand	2.475 per KVA	3.07 per KVA	.595 per KVA	24.04
For 138 KV Delivery Voltage				
First 25,000 KVA Demand	$2.575 per KVA	3.18 per KVA	.605 per KVA	23.50
Over 25,000 KVA Demand	2.425 per KVA	3.02 per KVA	.595 per KVA	24.54
Secondary—All Voltage				
Energy in Excess of 300 KWHrs per KVA Demand	$ .335 per KWH	.48 per KWH	.145 per KWH	43.28

APPENDIX A-3

APPALACHIAN POWER COMPANY

Reconciliation Between Per Books and Final Adjusted Revenues. Expenses and Rate Base, Based on Year Ended December 31, 1970

	Per Books	Adjustments Allowed By Commission	Explanation Of Adjustments	Adjusted	To Assign A & G Expenses To Functions	Adjusted	Allocated To W. Va. Jurisdictional Customers
	$	$		$	$	$	$
Operating Revenues	199,213,531	1,321,522	Deficiency as stated in order	200,535,053		200,535,053	92,831,781
Operating Revenue Deductions							
Expenses:							
		(755,005)	Coal cost adjusment-interest				
		1,647	Insurance adjustment				
Power Production Expenses	66,942,995	8,363	F.I.C.A. increase	67,153,072	2,731,175	69,884,247	30,426,824
		(61,778)	Coal inventory adjustment				
		112,933	Wage increase—affiliate				
		243,917	Wage adjustment				
		660,000	Pollution control facilities				
		24,824	Tree and brush control				
		33,913	Tower painting				
Transmission Expenses	4,130,859	12,459	Contract labor	4,295,255	1,092,156	5,387,411	2,485,727
		840	Gasoline tax increase				
		92,360	Wage adjustment				
		139,423	Tree and brush control				
		169,461	Pole treatment				
Distribution Expenses	11,651,753	66,949	Contract labor	12,283,584	2,992,691	15,276,275	8,250,316
		2,805	Gasoline tax increase				
		253,193	Wage adjustment				
		102,687	Postage increase				
Customer Accounts Expense	3,753,159	102,298	Wage adjustment	3,958,144	1,207,583	5,165,727	2,739,695

APPENDIX A-3

APPALACHIAN POWER COMPANY

Reconciliation Between Per Books and Final Adjusted Revenues, Expenses and Rate Base, Based on Year Ended December 31, 1970

	Per Books	Adjustments Allowed By Commission	Explanation Of Adjustments	Adjusted	To Assign A & G Expenses To Functions	Adjusted	Allocated To W. Va. Jurisdictional Customers
	$	$		$	$	$	$
Sales Expense	6,159,717	113,969	Wage adjustment	6,273,686	1,346,689	7,620,375	3,422,768
		18,119	Insurance adjustment				
		387,996	Insurance adjustment				
		90,312	Insurance adjustment				
Administrative and General	8,688,308	66,667	Rate case expense	9,370,294	(9,370,294)	0	
		118,892	Wage adjustment				
Total Expenses	101,326,791	2,007,244		103,334,035		103,334,035	47,325,330
Depreciation Expense	23,122,687	511,500	Pollution control facilities	23,634,187		23,634,187	10,954,422
Taxes Other Than Income Tax	17,592,704	467,343	Staff adjustments adopted	18,124,537		18,124,537	9,806,086
		64,490	* B. & O. Tax on deficiency				
Federal Income Tax	4,320,213	(1,411,156)	* Net effect of all adjustments	2,909,057		2,909,057	1,181,691
Total	146,362,395	1,639,421		148,001,816		148,001,816	69,267,529
Net Operating Income	52,851,136			52,533,237		52,533,237	23,564,252
Cost of Service							
Operating Revenue Deductions							69,267,529
Allowance for Return at 8.73%							23,564,252
Total							92,831,781
Test Year Revenues Adjusted to Going-Level							91,510,259
Revenue Deficiency							1,321,522

APPENDIX A-3

APPALACHIAN POWER COMPANY

Reconciliation Between Per Books and Final Adjusted Revenues, Expenses and Rate Base, Based on Year Ended December 31, 1970

Rate Base	Per Books	Adjustments Allowed By Commission	Explanation Of Adjustments	Adjusted	To Assign A & G Expenses To Functions	Adjusted	Allocated to W. Va. Jurisdictional Customers
	$	$		$	$	$	$
Plant in Service	809,606,726	16,500,000	Pollution control facilities	826,106,726			381,118,985
Plant Held for Future Use	821,118			821,118			378,977
Materials and Supplies	11,365,303			(11,365,303)			
Prepayments	611,187			611,187	Working capital components allocated as single amount		9,910,827
Cash Working Capital	9,463,588	250,906	⅛ of operating exp. adjs	9,714,494			
Reserve for Depreciation	(253,884,162)	(511,500)	Pollution control facilities	(254,395,662)			(116,457,346)
Contributions	(1,760,856)			(1,760,856)			(938,430)
Deferred Federal Income Taxes	(35,412,718)	26,560,718	Emergency facilities	(8,852,000)			(4,090,314)
Total Rate Base	540,810,186	42,800,124		583,610,310			269,922,699
				Return at 8.73% on $269,922,699 =			23,564,252

Notes: • Calculated adjustment based on net effect of other revenue and/or expense adjustments.

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, at the Capitol in the City of Charleston on the 14th day of February, 1975.

CASE NO. 7083

APPALACHIAN POWER COMPANY,
a corporation.
In the matter of
increased rates and charges.

INTERIM ORDER ON "PETITION FOR REHEARING, REOPENING OF THE RECORD, AND REARGUMENT" FILED BY APPALACHIAN POWER COMPANY

On January 31, 1975, the Commission issued its final order in the above-styled case. On February 7, 1975, Appalachian Power Company filed a seven-page document entitled "Petition for Rehearing, Reopening of the Record, and Reargument" (Hereinafter referred to as "Petition") pursuant to Rule 19 of the Rules of Practice and Procedure of this Commission. The petition, duly verified, was timely filed. However, the said petition is not in strict compliance with said Rule 19.

Rule 19(a) provides that: "Such petition shall state *specifically* the grounds relied upon." In addition, Rule 19(c) provides that "If the application be for rehearing or reargument after decision, the matters claimed to have been erroneously decided must be *specified and the alleged errors stated.* If thereby any order of the Commission is sought to be vacated, reversed, or modified, by reason of matters which have arisen since the

hearing, or by reason of consequences which would result from compliance therewith, or by reason of facts not in possession of the petitioner at the time of the hearing, *the matter so relied upon by the petitioner must be fully set forth in the petition.*" Moreover, Rule 19(e) provides that an adverse party may file and serve a reply to a petition for rehearing, reopening of the record and reargument within five days after service of the said petition.

No reply in opposition to the grant of the petition for rehearing was filed by any of the parties to this proceeding.

An examination of the petition filed by Appalachian Power Company indicates the following:

1. The duly verified petition is signed and timely filed by Miller C. Porterfield, Vice President of Appalachian Power Company, but is not signed by any attorney of record for the utility, although on February 13, 1975, the Commission received a Memorandum in support of Appalachian's petition signed by or on behalf of Charles C. Wise, Jr., and Charles R. McElwee, as attorneys for the utility.

2. As noted by a recital of excerpts from subdivisions (a), (c), and (e) of Rule 19 and a review of the allegations 1 through 9 of the petition, there are some questions of ambiguity or vaguity as to the *specific* grounds relied upon by Appalachian or *specific* errors charged to the Commission by the utility.

In addition, the said petition failed to set forth fully the matters relied upon which have arisen since the hearing or consequences which would result from compliance with the Commission's order of January 31, 1975, as to which relief is sought. Moreover, petitioner

did not *fully* or at all set forth *facts* which were not in possession of petitioner at the time of the hearing.

Regardless of these deficiencies in Appalachian's petition for rehearing, and partly because of the fact that there was no objection to the petition for rehearing by adverse parties, the said petition will hereinafter be granted in part, denied in part, and the balance deferred until after oral argument set by this order.

In Paragraph 1 of its said petition for rehearing, the utility alleges that the Commission's order of January 31, 1975, used "outmoded formulas" and a "stale test period". These allegations and their implications require additional preciseness and specificity before the Commission can act upon the petition.

In Paragraph 2 of its petition, the utility alleges that the "effect of the order is literally to wipe out Appalachian's available coverage and, with it, its remaining ability to sell senior securities. Appalachian's financial integrity is therefore seriously, and, possibly, critically jeopardized by this order." The seriousness of this allegation alone requires further consideration by the Commission on oral argument prior to further action on the petition.

Paragraph 3 of the petition involves a general allegation that the "end result" test of the *Hope* case has not been met by the order complained of.

The allegation set forth in Paragraph 4 of the petition refers to an alleged error resulting from the Commission's order of September 16, 1974, in this case in which the Commission required an interim modification of Appalachian's fuel adjustment clause. As recited in

the Commission's order of January 31, 1975, Appalachian filed on September 24, 1974, a petition for rehearing on this order of September 16, 1974. This September petition for rehearing was denied by the Commission by its order issued October 18, 1974. Thus the order of September 16, 1974, has long since become final. Therefore, because of the fact that Code 24-5-1 requires that the party feeling aggrieved by a final order of the Commission may present a petition in writing to the Supreme Court of Appeals within thirty (30) days after entry of such order, praying for the suspension of such final order, the petitioner here comes too late as of February 7, 1975, to attack the Commission's final order of September 16, 1974, and raising this issue at this time is a collateral attack on the September order.

In Paragraph 5 of its petition, Appalachian objected to the timing required in the order of January 31, 1975, as to its obligation to grant refunds and to file revised rate schedules. The utility's objection to this timing is well-taken and relief as to this matter will be granted by the modification set forth below in this order.

In paragraph 6 of the petiton, the utility objects to the fact that E. Dandridge McDonald acted as counsel and as a witness for an adverse party in the early part of the hearing in this case and then took part in the preparation of the Staff's Brief and signed the same at the latter stages of this proceeding. Because Appalachian hints of an impropriety in this matter, this issue will be the subject of the further proceedings in this case which will be provided for below.

In Paragraph 7 of the petition, the utility raises a legal issue under Code 24-2-4 pertinent to the time within

which the Commission shall render its decision after the completion of hearing.

In Paragraph 8 of its petition, Appalachian appears to suggest that the Commission's order will cause financial and economic effects which cannot be corrected because of the law of "reparations". This, too, is a factual-legal question which will be considered at a later stage of this proceeding pursuant to the provisions of this order.

In Paragraph 9 of its petition, the utility suggests a reopening of the record to receive "evidence as to the actual results for the intervening period" (i.e., apparently July 1971 to date); also, it alleges that its evidence would show "that an increase of only $1,321,522 based on 1970 test year results is confiscatory as applied to Appalachian in the intervening years."

The utility's serious allegations glossed above and the requirements of Rule 19 of the Commission's Rules of Practice and procedure, require the following order:

ORDER

A. The Commission hereby affirms its ordering Paragraphs 1 and 4 of its order issued herein on January 31, 1975, subject to further order after oral argument to be held pursuant to this order.

B. The Commission orders that Paragraphs 2 and 3 of its order issued January 31, 1975, be revised and modified to read as follows:

2. Appalachian Power Company is ordered to file revised sheets for all of its P.S.C. W. Va. No. 2 tariff schedules, which will be effective on and after July

29, 1971, containing first revised sheets where appropriate which set forth reduced rates and charges under the rate design used in its filing on February 3, 1971, at levels which are only high enough to recover the 1970 test-year deficiency of $1,321,522, over the revenue level of the 1970 test year. These revisions should be filed within sixty (60) days of the date of this order of January 31, 1975, and the revisions shall be subject to the approval by this Commission as to their conformity with the findings and conclusions stated herein.

3. Respondent shall refund to each of its customers within ninety (90) days of the date the revised rates filed pursuant to Paragraph 2 are approved by order of this Commission as being finally put into effect as of July 29, 1971, with interest at the rate of six percent (6%) per annum from the time collected to the date of the refund, and shall promptly report such refunds to the Commission.

C. The Commission orders that the parties to this proceeding appear before it on February 21, 1975, at 10:00 a.m., for oral argument on the matters alleged by Appalachian Power Company in Paragraphs 1, 2, 3, 6, 7, 8, and 9 of this petition for rehearing.

D. The Commission orders that at the oral argument to be held on February 21, 1975, Mr. Miller C. Porterfield be present to be sworn and his additional testimony be given on matters pertaining to his allegation in Paragraph 6 of the petition for rehearing prior to any further ruling by this Commission on Paragraph 6 of said petition.

E. The Commission orders that further consideration of the matters raised in Paragraphs 1, 2, 3, 6, 7, 8, and

9 be deferred until after oral argument and the testimony of Mr. Miller C. Porterfield to be taken on February 21, 1975.

A Copy.

Teste:

S. GROVER SMITH, JR.
Secretary

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, at the Capitol in the City of Charleston on the 21st day of March, 1975.

CASE NO. 7083

APPALACHIAN POWER COMPANY,
a corporation.
In the matter of
increased rates and charges.

ORDER DENYING IN PART AND GRANTING IN PART PETITIONS FOR REHEARING FILED BY APPALACHIAN POWER COMPANY

POST–DECISIONAL PROCEDURE

Subsequent to the final decision of the Commission dated January 31, 1975, Appalachian filed a petition for rehearing on February 7, 1975. On February 14, 1975, the Commission issued its interim order, which, among other things, set February 21, 1975, for oral argument and limited testimony on matters alleged by Appalachian Power Company in Paragraphs 1, 2, 3, 6, 7, 8 and 9 of its first petition for rehearing. On February 25, 1975, Appalachian filed its second petition for rehearing, going to the Commission's interim order of February 14, 1975, as well as to portions of its order of January 31, 1975, in this proceeding.

At the close of the session on February 21, 1975, the Commission continued this phase of the post-decisional proceedings to March 7, 1975, to permit Appalachian's counsel, Charles C. Wise, Jr., to be present and be heard on behalf of his client, as well as to permit Appalachian

to present the evidence of one witness to support its argument on the importance of debt coverage to the utility's ability to finance. The purpose of these post-decisional proceedings was to permit the Commission to decide whether or not, and to what extent, to grant relief as prayed for in Appalachian's two petitions for rehearing.

DISCUSSION

These two post-decision sessions were useful in confirming the Commission's belief that its prior orders in this case were correct. However, the Commission finds that Appalachian should be granted certain limited procedural relief so as to have the opportunity to present actual cost evidence on the issue of the just and reasonableness of its rates for the period on and after January 1, 1974, through March 31, 1975. Moreover, the limited procedural relief granted herein does not relieve Appalachian in any way from its obligation to file lower rates and to make immediate refunds to its customers for the period from July 29, 1971, through December 31, 1973, under our order of January 31, 1975. The lower rates ordered to be filed for the interim July 29, 1971, through December 31, 1973, are final.

The remaining ultimate issue of the extent to which the originally filed rates now in effect, subject to refund, should be lowered for the period January 1, 1974, through March 31, 1975, remains open until our decision after further evidence is taken pursuant to this order. The actual cost evidence to be presented by Appalachian shall be limited to the period of time subsequent to December 31, 1973, and shall be presented by applying the ratemaking principles established in our said order issued January 31, 1975. There are ample precedents in past cases decided by this Commission for it

to establish two different levels of rates for two sequential time periods within one numbered case. *C & P Telephone Company*, order issued May 4, 1972, Case No. 6855. The legal principle has also been established that a regulatory commission may set interim rates and order immediate refunds thereon, while other issues in the same rate case are pending for subsequent decision. *F.P.C. v. Tennessee Gas Transmission Company*, (1962) 371 US 145, 83 S.Ct. 211, 46 PUR 3d 347.

The basis of this order which denies in part and grants in part the petitions for rehearing are best discussed under topical sections rather than by incidental references to the numbered paragraphs of the first petition for rehearing, since some of the grounds relied upon by Appalachian in its petitions for rehearing are overlapping or intermingled.

1. **Ratemaking Principles.**

Appalachian's first ground of alleged error was to accuse the Commission of the use of "outmoded formulas" in ratemaking, although Appalachian did not specify any particulars. However, at the oral argument at page 30 of the transcript for February 21, 1975, counsel for Appalachian abandoned this ground and stated that they were "specifically *not* challenging in this proceeding your use of the average rate base *or the other ratemaking philosophies embedded in your decision.*"

Instead, Appalachian focused its attack on the Commission's order to the general complaint that the "end result" of our order "impaired Appalachian's credit standing" and "has precluded Appalachian from attracting additional capital on a reasonable basis necessary to carry out its public service obligations," citing *F.P.C.* v. *Hope Natural Gas Co.*, (1944) 320 U.S.591, 64 S.Ct. 281.

Appalachian's financial troubles have not been caused by any ill treatment by this Commission. At page 14 of the transcript for February 21, 1975, counsel for Appalachian volunteered that the utility was unable to sell $44 million of pollution control bonds, but had to settle for $24 million. This financial difficulty occurred *prior* to the issuance of our order of January 31, 1975, and during a time when Appalachian was receiving all of the revenues from its West Virginia customers that it had applied for, albeit that a portion of the revenues have since been ordered to be refunded with interest. At page 41 of the transcript, counsel admitted that our order was not the sole cause of Appalachian's problems, but was the "crowning blow," that is, after the fact.

Other than the invalid implication that this Commission should "guarantee" a fair rate of return, rather than to give Appalachian the *opportunity* to earn a fair rate of return, Appalachian's only other specific complaint with our ratemaking was the use of a "stale test period," 1970. At page 29 on the transcript, counsel for Appalachian admitted that the selection of the test year of 1970 for a 1973 hearing was the Company's option. It was not imposed by the Commission. At the time of the 1973 hearing, Appalachian could have elected to prove its case by using 1971, 1972, or a twelve-month period ending in early 1973, or some other appropriate twelve months' period to be chosen as a representative test period. Appalachian elected not to do so. Instead, it relied on a *1970* test year and at the same time during the hearing adjusted the test year cost of service by cost of capital evidence based on *year end 1972*. The Commission relied on this evidence of factual data which occurred two years after the end of the test period. It did this primarily because of the occurrence of regulatory lag, for which the Commission was only partly responsible.

Further, it is because of its partial responsibility for regulatory lag that the Commission is here reopening the evidentiary record in this case for the period beginning January 1, 1974. By this procedure, the Commission is neutralizing any adverse procedural effect of the time lag between the end of the briefing period and the issuance of its final decision and order on January 31, 1975. Code 24-2-4, provides that "when all evidence shall have been taken, and the hearing completed, the Commission shall, within three months, render a decision" in any pending case. Our action herein permitting a limited reopening of the evidentiary record brings us within the statutory requirement just quoted, while at the same time protecting the rights of the consumers to quick refunds for the 1971-1973 period that is final.

Although the Commission shares some of the responsibility for the 1974 regulatory lag, it is clear that Appalachian is *solely* responsible for the staleness of a 1970 test period, for the periods of time in 1971, 1972 and 1973. Any financial difficulty in which Appalachian finds itself for the period ending December 31, 1973, is of its own doing. The Commission must rely on the record which was made in 1973, and confirmed by Appalachian's unaudited Annual Reports to the Commission for 1972 and 1973, insofar as the issue of debt coverage is concerned.

The issue of adequate debt service coverage to enable Appalachian to raise necessary new capital in 1975 from investors depends upon Appalachian's income and expenses for 1974 and early 1975. Appalachian has already raised money from investors in 1971, 1972, 1973 and 1974, with what must have been adequate debt service coverage. (Transcript March 7, 1975, pages 58-59.) Actual data covering 1971, 1972, and 1973 will not aid Appalachian's debt service coverage requirements for its 1975 financing.

Our action today in permitting a limited reopening of the record for current actual data beginning January 1, 1974, permits Appalachian's debt coverage to remain at 2.24 times for immediate financing efforts of Appalachian, including a pending stock offering. The debt service coverage for late 1975 or 1976 financing may be more or less than 2.24 depending upon our actions on the reopened record provided for herein *and* the actions of other Federal and State governmental agencies in which Appalachian has or may seek relief. None of the witnesses for Appalachian who testified on February 21 and March 7, 1975, would state that rate relief in West Virginia alone would solve Appalachian's financial troubles or permit them to continue its suspended 1975 construction program. (Transcript February 21, 1975—G. P. Maloney, pages 141-15; John W. Vaughan, page 169; Richard Disbrow, pages 184-186; T. J. Vogel, pages 194-196; Transcript March 7, 1975—Jerome S. Katzin, pages 51-54, 57-60.)

The limited reopening of the record for Appalachian's actual experience for the period beginning January 1, 1974, and our denial of Appalachian's petition to reopen for the period 1971 through 1973, follow two applicable principles.

First, the limited reopening gives Appalachian an opportunity to prove that the effects of our order of January 31, 1975, are unduly harsh, which, unless modified, would prevent needed financing "contrary to the best interests of Appalachian's *customers.*" Moreover, since under West Virginia law, reparations for past losses are not available to a utility, except within our statutory framework of definite refund periods, Appalachian's right to minimize its obligation to make

refunds in excess of collections made on and after January 1, 1974, is retained for this limited period until after further hearing. This is in keeping with our observations at pages 10 and 25 [pages 18 and 38 of this Appendix to Jurisdictional Statement] of our order of January 31, 1975, of possible avenues of relief open to Appalachian in the event the effects of our order were "unduly harsh" or if Appalachian's growing pains were made more acute by our order.

Second, there must be an end to litigation. In this respect, the *customers* of Appalachian have the right to receive immediate refunds with interest "to afford consumers a complete, permanent, and effective bond of protection from excessive rates and charges." Cf. *F.P.C. v. Tennessee Gas Transmission Co., supra*, 46 PUR 3d, at page 353. Since Appalachian's losses in the period 1971 through 1973 are due entirely to its evidentiary approach in the full hearing granted, it must shoulder the hazards incident to its action, including the refund of any illegal gain.

2. **Other Issues.**

In Paragraph 6 of its first petition for rehearing, the utility cites as error the fact that the Commission adopted certain recommendations in the staff brief merely because it was prepared in part and solely signed by E. Dandridge McDonald, who appeared earlier in this case for an intervenor representing certain residential consumers and later joined the legal staff of the Commission. The ground for alleged error is entirely rejected by the Commission as without basis in law or fact or as a breach of ethics. Appalachian raised no question about the conduct of Mr. McDonald during the hearing. It did not show he took an inconsistent position in his two roles. However, the most telling point to completely

vindicate Mr. McDonald is that counsel for Appalachian, Mr. Charles C. Wise, Jr., was completely apprised of the situation by all three of the then Commissioners and he did not object and fully advised his client of Mr. McDonald's participation in this case on behalf of the staff. (Transcript, March 7, 1975, pages 4-13.) Thus, this Commission finds and concludes that the actions of Appalachian's consel binds his client and Appalachian cannot now, for the first time, raise in its first petition for rehearing any question as to the propriety of Mr. McDonald's participation in these proceedings.

The grounds of error set forth in Paragraphs 4 and 5 of Appalachian's first petition for rehearing were fully considered and acted upon by the Commission in its interim order herein, issued on February 14, 1975, and are hereby confirmed, with the exception that because of the time required for the interim procedure between our order of January 31, 1975, and today, the periods of time to file revised rates and to make refunds will be extended for thirty (30) days, as hereinafter provided.

Appalachian's second petition for rehearing filed February 24, 1975, raises no new matters and appears to have been filed to preserve its right to seek judicial review of our interim order issued February 14, 1975, and is, therefore, denied in its entirety as being without basis in law or fact.

It is to be noted that this Commission's order of February 20, 1975, in Case No. 7945, will require Appalachian to file new tariff sheets to be effective April 1, 1975, pursuant to ruling on fossil fuel adjustment clauses in the tariffs of electric companies subject to our jurisdiction.

ORDER

A. The Commission orders that Paragraph 1 of its order issued January 31, 1975, be revised and modified to read as follows:

> 1. The tariff sheets filed with the Commission by the respondent, Tariff P.S.C. W. Va. No. 2, issued February 3, 1971, are ordered to be amended hereby as to their effective and terminating dates, to be January 1, 1974, and March 31, 1975, respectively.

B. The Commission orders that Paragraphs 2 and 3 of its order issued January 31, 1975, as revised and modified by its interim order issued February 14, 1975, be further revised and modified to read as follows:

> 2. Appalachian Power Company is ordered to file revised sheets for all of its P.S.C. W. Va. No. 2 tariff schedules, which will be effective on and after July 29, 1971, through December 31, 1973, containing first revised sheets where appropriate which set forth reduced rates and charges under the rate design used in its filing on February 3, 1971, at levels which are only high enough to recover the 1970 test-year deficiency of $1,321,522, over the revenue level of the 1970 test year. These revisions should be filed within ninety (90) days of the date of this order of January 31, 1975, and the revisions shall be subject to the approval by this Commission as to their conformity with the findings and conclusions stated herein.
>
> 3. Respondent shall refund to each of its customers within one hundred-twenty (120) days of the date the revised rates filed pursuant to Paragraph 2 are approved by order of this Commission as being finally put into effect as of July 29, 1971, with interest

> at the rate of six percent (6%) per annum from the time collected to the date of the refund, and shall promptly report such refunds to the Commission.

C. The Commission hereby affirms its ordering Paragraph 4 of its order issued herein on January 31, 1975.

A Copy.

Teste:

S. GROVER SMITH, JR.,
Secretary

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 23rd day of June, 1975, the following order was made and entered, to-wit:

APPALACHIAN POWER COMPANY,
a corporation

vs. (P.S.C. Case No. 7083)

THE PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA

Upon an appeal from, suspension and review of the final order of the Public Service Commission of West Virginia made and entered on March 21, 1975.

The Court having maturely considered the petition and note of argument thereof; the record consisting of all papers, documents and evidence which were before the Public Service Commission at the hearing which resulted in the entry of the final order complained of; the statement of reasons for the entry of its order of the 21st day of March, 1975, filed herein by the respondent, Public Service Commission of West Virginia on April 22, 1975; and the oral argument of counsel on the 22nd day of April, 1975, the date fixed by the Court for hearing upon the aforesaid petition; is of opinion that the petitioner has not shown itself entitled to the relief prayed for in its said petition. It is therefore considered and ordered that the prayer of the petition for an appeal from, suspension and review, in this proceeding, be, and the same is hereby, denied. Justice Berry deeming himself disqualified did not participate in the consideration of this proceeding.

It is further ordered that leave be, and the same is hereby, granted to the Public Service Commission of West Virginia to withdraw from the office of the Clerk of this Court, the record consisting of all papers, documents and evidence originally filed with the Public Service Commission of West Virginia.

A True Copy

Attest:

s/ GEORGE W. SINGLETON
Clerk Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 29th day of July, 1975, the following order was made and entered, to-wit:

APPALACHIAN POWER COMPANY,
a corporation

vs. (P.S.C. Case No. 7083)

THE PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA

On a former day, to-wit, July 23, 1975, came James, Wise, Robinson & Magnuson and Charles R. McElwee; LeBoeuf, Lamb, Lieby & MacRaw, Carl D. Hobelman and Samuel M. Sugden; A. Joseph Dowd and John R. Burton, counsel for Appalachian Power Company, a corporation, and presented to the Court its "motion for reconsideration of the Court's Order of June 23, 1975, and petition for rehearing on its petition for appeal and review filed on April 7, 1975, and for incidental or alternative relief specified in the prayer hereof", amendment and revision of said motion, and note of argument in support thereof, and the Court having seen and inspected said motion is of opinion not to consider the same as not timely filed. Justice Berry, deeming himself disqualified, did not participate. Justice Neely absent.

A True Copy

Attest:
s/ GEORGE W. SINGLETON
Clerk Supreme Court of Appeals

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
CHARLESTON

APPALACHIAN POWER COMPANY,
a corporation,

Appellant,
*No.*_____

v. (P.S.C. Case No. 7083)

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Appalachian Power Company, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Appeals of the State of West Virginia entered in this proceeding on June 23, 1975, which denied Appalachian Power Company's Petition for an appeal from, and review of, certain orders issued by the Public Service Commission of West Virginia, the appellee above named, on September 16, 1974 and October 18, 1974, and further issued on January 31, 1975, February 14, 1975 and March 21, 1975.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: June 30, 1975.

s/ CHARLES R. MCELWEE
Counsel for Appalachian Power Company,
Appellant

James, Wise, Robinson & Magnuson
316 Charleston National Plaza
Post Office Box 951
Charleston, West Virginia 25323

Carl D. Hobelman, Esquire and
Samuel M. Sugden, Esquire
LeBoeuf, Lamb, Leiby & MacRae
140 Broadway
New York, New York 10005

John R. Burton, Esquire
Associate General Counsel
American Electric Power Service Corporation
2 Broadway
New York, New York 10004

Of Counsel

Affidavit of Service of Notice of Appeal

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, TO-WIT:

I, Charles R. McElwee, an attorney in the office of James, Wise, Robinson & Magnuson, attorneys of record for Appalachian Power Company, appellant herein, depose and say that on the 30th day of June, 1975, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States upon the Public Service Commission of West Virginia, appellee herein, by delivering the same to John E. Lee and E. Dandridge McDonald, counsel of record for said Public Service Commission of West Virginia, at their offices in the State Capitol, Charleston, West Virginia.

S/ CHARLES R. MCELWEE

Subscribed and sworn to before me MARY N. STAPLES, at Charleston, West Virginia, this 30th day of June, 1975.

S/ MARY N. STAPLES
Notary Public in and for
Kanawha County, West Virginia

My commission expires June 6, 1985.

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
CHARLESTON

APPALACHIAN POWER COMPANY,
a corporation,

Appellant,
No. _____

v. (P.S.C. Case No. 7083)

PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Appalachian Power Company, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Appeals of the State of West Virginia entered in this proceeding on June 23, 1975, and from that Court's order of July 29, 1975, which denied Appalachian Power Company's Petition for an appeal from, and review of, certain orders issued by the Public Service Commission of West Virginia, the appellee above named, on September 16, 1974 and October 18, 1974, and further issued on January 31, 1975, February 14, 1975 and March 21, 1975.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

Dated: October 14, 1975.

s/ CHARLES R. MCELWEE
Attorney for Appalachian Power Company,
Appellant

A. Joseph Dowd, *General Counsel* and
John R. Burton, *Associate General Counsel*
American Electric Power Service
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2 Broadway
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Carl D. Hobelman, Esquire and
Samuel M. Sugden, Esquire and
John B. Chase
LeBoeuf, Lamb, Leiby & MacRae
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Charles R. McElwee
James, Wise, Robinson & Magnuson
316 Charleston National Plaza
Post Office Box 951
Charleston, West Virginia 25323

Attorneys for Appellant,
Appalachian Power Company

Affidavit of Service of Notice of Appeal

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, TO-WIT:

I, Charles R. McElwee, an attorney in the office of James, Wise, Robinson & Magnuson, attorneys of record for Appalachian Power Company, appellant herein, depose and say that on the 14th day of October, 1975, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States upon the Public Service Commission of West Virginia, appellee herein, by delivering the same to E. Dandridge McDonald, counsel of record for said Public Service Commission of West Virginia, at his office in the State Capitol, Charleston, West Virginia.

s/ CHARLES R. MCELWEE

Subscribed and sworn to before me MARY N. STAPLES, at Charleston, West Virginia this 14th day of October, 1975.

s/ MARY N. STAPLES
Notary Public in and for
Kanawha County, West Virginia

My commission expires June 6, 1985.

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

APPALACHIAN POWER COMPANY,
a corporation,

Appellant,

v. (P.S.C. Case No. 7083)

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Appalachian Power Company, the appellant above named, hereby appeals to the Supreme Court of the United States from the final orders issued in this proceeding by the Public Service Commission of West Virginia, the appellee above named, on September 16, 1974 and October 18, 1974, and further issued on January 31, 1975, February 14, 1975 and March 21, 1975, paragraph 2 of said order of January 31, 1975, as amended, having been suspended by said Commission until July 3, 1975, and a petition for appeal from which orders was denied by the West Virginia Supreme Court of Appeals on June 23, 1975.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: July 2, 1975.

s/ CHARLES R. MCELWEE

Counsel for Appalachian Power Company
Appellant

James, Wise, Robinson & Magnuson
316 Charleston National Plaza
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Carl D. Hobelman, Esquire and
Samuel M. Sugden, Esquire
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140 Broadway
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John R. Burton, Esquire
Associate General Counsel
American Electric Power Service Corporation
2 Broadway
New York, New York 10004

Of Counsel

Affidavit of Service of Notice of Appeal

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, TO-WIT:

I, Charles R. McElwee, an attorney in the office of James, Wise, Robinson & Magnuson, attorneys of record for Appalachian Power Company, appellant herein, depose and say that on the 2d day of July, 1975, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States upon FMC Corporation, Intervenor, by depositing the same in a United States mail box, with first class postage prepaid, addressed to its counsel of record, T. D. Kauffelt, Esquire, P. O. Box 1386, Charleston, West Virginia, 25325, and F. T. Graff, Jr., Esquire, P. O. Box 1386, Charleston, West Virginia 25325; upon Logan Coal Operators Association, Island Creek Coal Company, and Semet Solvay Division, Intervenors, by depositing the same in a United States mail box, with first class postage prepaid, addressed to their counsel of record, Paul Chambers, Esquire, P. O. Box 553, Charleston, West Virginia 25322; and Charles Q. Gage, Esquire, P. O. Box 553, Charleston, West Virginia, 25322; upon Appalachian Research and Defense Fund, Mercer County Economic Corporation, Intervenors, by depositing the same in a United States mail box, with first class postage prepaid, addressed to their counsel of record, Robert Rodecker, Esquire, 1116-B Kanawha Boulevard, East, Charleston, West Virginia, 25301; and upon the Public Service Commission Staff by depositing the same in the United States mail box, with first class postage prepaid, addressed to its counsel of record, John Lee, Staff Counsel, Public Service Commission, State Capitol, Charleston, West Virginia, 25305.

s/ CHARLES R. MCELWEE

Subscribed and sworn to before me BARBARA J. DIXON at Charleston, West Virginia, this 2nd day of July, 1975.

s/ BARBARA J. DIXON
Notary Public in and for
Kanawha County, West Virginia

My commission expires June 17, 1980.

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

APPALACHIAN POWER COMPANY
a corporation,

Appellant,

v. (P.S.C. Case No. 7083)

PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Appalachian Power Company, the appellant above named, hereby appeals to the Supreme Court of the United States from the final orders issued in this proceeding by the Public Service Commission of West Virginia, the appellee above named, on September 16, 1974 and October 18, 1974, and further issued on January 31, 1975, February 14, 1975 and March 21, 1975, paragraph 2 of said order of January 31, 1975, as amended, having been suspended by said Commission until July 3, 1975, and a petition for appeal from which orders was denied by the West Virginia Supreme Court of Appeals on June 23, 1975, and its denial was sustained by a further order of the West Virginia Supreme Court of Appeals on July 29, 1975.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: October 14, 1975.

s/ CHARLES R. MCELWEE
Attorney for Appalachian Power Company,
Appellant

A. Joseph Dowd, *General Counsel* and
John R. Burton, *Associate General Counsel*
American Electric Power Service
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Carl D. Hobelman, Esquire and
Samuel M. Sugden, Esquire and
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Charles R. McElwee
James, Wise, Robinson & Magnuson
316 Charleston National Plaza
Post Office Box 951
Charleston, West Virginia 25323

Attorneys for Appellant,

Appalachian Power Company

Affidavit of Service of Notice of Appeal

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, TO-WIT:

I, Charles R. McElwee, an attorney in the office of James, Wise, Robinson & Magnuson, attorneys of record for Appalachian Power Company, appellant herein, depose and say that on the 14th day of October, 1975, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States upon FMC Corporation, Intervenor, by depositing the same in a United States mail box, with first class postage prepaid, addressed to its counsel of record, T. D. Kauffelt, Esquire, P. O. Box 1386, Charleston, West Virginia, 25325, and F. T. Graff, Jr., Esquire, P. O. Box 1386, Charleston, West Virginia 25325; upon Logan Coal Operators Association, Island Creek Coal Company, and Semet Solvay Division, Intervenors, by depositing the same in a United States mail box, with first class postage prepaid, addressed to their counsel of record, Paul Chambers, Esquire, P. O. Box 553, Charleston, West Virginia 25322, and Charles Q. Gage, Esquire, P. O. Box 553, Charleston, West Virginia, 25322; upon Appalachian Research and Defense Fund, Mercer County Economic Corporation, Intervenors, by depositing the same in a United States mail box, with first class postage prepaid, addressed to their counsel of record, Robert Rodecker, Esquire, 1116-B Kanawha Boulevard, East, Charleston, West Virginia, 25301; and upon the Public Service Commission Staff by depositing the same in the United States mail box, with first class postage prepaid, addressed to its counsel of record, E. Dandridge

McDonald, Staff Counsel, Public Service commission, State Capitol, Charleston, West Virginia, 25305.

s/ CHARLES R. MCELWEE

Subscribed and sworn to before me MARY N. STAPLES, at Charleston, West Virginia, this 14th day of October, 1975.

s/ MARY N. STAPLES
Notary Public in and for
Kanawha County, West Virginia

My commission expires June 6, 1985.

WEST VIRGINIA CODE

§ 24-1-7. Rules of procedure; commission not bound by rules of evidence or pleadings; inscription on, use of and judicial notice of seal.*

The commission shall prescribe rules of procedure and for taking evidence in all matters that may come before it, and enter such orders as may be just and lawful. In the investigations, preparations and hearings of cases, the commission shall not be bound by the technical rules of pleading and evidence, but in that respect it may exercise such discretion as will facilitate its efforts to understand and learn all the facts bearing upon the right and justice of the matters before it.

The commission shall have a seal bearing the following inscription: "The Public Service Commission of West Virginia." The seal shall be affixed to all writs and authentications of copies of records, and to such other instruments as the commission shall direct. All courts shall take judicial notice of said seal. (1913, c. 9, § 2; 1915, c. 8, § 2; Code 1923, c. 15-0, § 2.)

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*printed in: West Virginia Code, Volume 9, The Michie Company, § 24-1-7, at 7 (1971 Replacement Volume)

§ 24-2-3. General power of commission with respect to rates.*

The commission shall have power to enforce, originate, establish, change and promulgate tariffs, rates, joint rates, tolls and schedules for all public utilities except carriers by vehicles over streets and roads, including municipalities supplying gas, electricity or water. And whenever the commission shall, after hearing, find any existing rates, tolls, tariffs, joint rates or schedules unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any of the provisions of this chapter, the commission shall by an order fix reasonable rates, joint rates, tariffs, tolls or schedules to be followed in the future in lieu of those found to be unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any provisions of law, and the said commission, in fixing the rate of any railroad company, may fix a fair, reasonable and just rate to be charged on any branch line thereof, independent of the rate charged on the main line of such railroad. (1915, c. 8, § 22; Code 1923, c. 15-0, § 22.)

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*printed in: West Virginia Code, Volume 9, The Michie Company, § 24-2-3, at 17 (1971 Replacement Volume)

§ 24-2-4. Procedure for changing rates.*

No public utility subject to this chapter shall change, suspend or annul any rate, joint rate, charge, rental or classification except after thirty days' notice to the commission and the public, which notice shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates or charges shall go into effect. But the commission may enter an order suspending the proposed rate as hereinafter provided. The proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time, and kept open to public inspection: Provided, however, that the commission may, in its discretion, and for good cause shown, allow changes upon less time than the notice herein specified, or may modify the requirements of this section in respect to publishing, posting and filing of tariffs, either by particular instructions or by general order.

Whenever there shall be filed with the commission any schedule stating a change in the rates or charges, or joint rates or charges, or stating a new individual or joint rate or charge or joint classification or any new individual or joint regulation or practice affecting any rate or charge, the commission shall have authority, either upon complaint or upon its own initiative without complaint, to enter upon a hearing concerning the propriety of such rate, charge, classification, regulation or practice; and, if the commission so orders, it may proceed without answer or other form of pleading by the interested parties, but upon reasonable notice, and, pending

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*printed in: West Virginia Code, Volume 9, The Michie Company, § 24-2-4, at 18 (1971 Replacement Volume)

such hearing and the decision thereon, the commission, upon filing with such schedule and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, charge, classification, regulation or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, classification, regulation or practice goes into effect, the commission may make such order in reference to such rate, charge, classification, regulation or practice as would be proper in a proceeding initiated after the rate, charge, classification, regulation or practice had become effective: Provided, that if any such hearing and decision thereon cannot be concluded within the period of suspension, as above stated, such rate, charge, classification, regulation or practice shall go into effect at the end of such period. In such case the commission may require such public utility to enter into a bond in an amount deemed by the commission to be reasonable and conditioned for the refund to the persons or parties entitled thereto of the amount of the excess, plus interest at the rate of six percent per annum, if such rates so put into effect are subsequently determined to be higher than those finally fixed for such utility. No such accrued interest paid shall be deemed part of the cost of doing business in a subsequent application for changing rates or any decision thereon. At any hearing involving a rate sought to be increased or involving the change of any fare, charge, classification, regulation or practice, the burden of proof to show that the increased rate or proposed increased rate, or the proposed change of fare, charge, classification, regulation or practice is just and reasonable shall be upon

the public utility making application for such change. When in any case pending before the commission all evidence shall have been taken, and the hearing completed, the commission shall, within three months, render a decision in such case.

Where more than twenty members of the public are affected by a proposed change in rates, it shall be a sufficient notice to the public within the meaning of this section if such notice is published as a Class II legal advertisement in compliance with the provisions of article three [§ 59-3-1 et seq.], chapter fifty-nine of this Code, and the publication area for such publication shall be the community where the majority of the resident members of the public affected by such change reside or, in case of non-residents, have their principal place of business within this State. (1913, c. 9, § 9; 1915, c. 8; § 9; 1921, c. 150, § 9; Code 1923, c. 15-0, § 9; 1953, c. 152; 1967, c. 105.)

§ 24-5-1. Review of final orders of commission.*

Any party feeling aggrieved by the entry of a final order by the commission, affecting him or it, may present a petition in writing to the supreme court of appeals, or to a judge thereof in vacation, within thirty days after the entry of such order, praying for the suspension of such final order. The applicant shall deliver a copy of such petition to the secretary of the commission before presenting the same to the court or the judge. The court or judge shall fix a time for the hearing on the application, but such hearing, unless by agreement of the parties, shall not be held sooner than five days after its presentation; and notice of the time and place of such hearing shall be forthwith delivered to the secretary of the commission, so that the commission may be represented at such hearing by one or more of its members or by counsel. If the court or the judge after such hearing be of the opinion that a suspending order should issue, the court or the judge may require bond, upon such conditions and in such penalty, and impose such terms and conditions upon the petitioner, as are just and reasonable. For such hearing the commission shall file with the clerk of said court all papers, documents, evidence and records or certified copies thereof as were before the commission at the hearing or investigation resulting in the entry of the order from which the petitioner appeals. The commission shall file with the court before the day fixed for the final hearing a written statement of its reasons for the entry of such order, and after arguments by counsel the court shall decide the matter in controversy as may seem to be just and right. (1913, c. 9, § 16; Code 1923, c. 15-0, § 16.)

*printed in: West Virginia Code, Volume 9, The Michie Company, § 24-5-1, at 43 (1971 Replacement Volume)

Rules of Practice and Procedure, Public Service Commission of West Virginia,

RULE 19—Further Hearing, Reopening, or Rehearing.*

(a) Applications for (1) further hearing in a proceeding after the closing of testimony and before final submission on oral argument or brief, for (2) reopening a proceeding after final submission and before decision, or for (3) rehearing or reargument after decision, must be made by petition, duly verified, within ten (10) days after the date of such closing of testimony, final submission or decision, as the case may be. Such petition shall state specifically the grounds relied upon, and shall be filed with the Commission and a copy served by the petitioner upon each adverse party, or his attorney, who appeared at the hearing, or oral argument, if any, or on brief.

(b) If the application be for further hearing before final submission, or for reopening the proceeding to take further evidence after submission and before decision, the nature and purpose of the evidence to be adduced must be briefly stated, and it must appear not to be merely cumulative.

(c) If the application be for rehearing or reargument after decision, the matters claimed to have been erroneously decided must be specified and the alleged errors stated. If thereby any order of the Commission is sought to be vacated, reversed, or modified, by reason of matters which have arisen since the hearing, or by reason of consequences which would result from compliance therewith, or by reason of facts not in possession of the petitioner at the time of the hearing, the

*printed in: Public Service Commission of West Virginia, Rules of Practice and Procedure, at 22 (1969)

matter so relied upon by the petitioner must be fully set forth in the petition.

(d) Application for modification of orders which seek only change in the date when they shall take effect, or in the period of notice thereby prescribed, must be made by petition seasonably filed and served in like manner as other applications under this rule, except that, in case of unforeseen emergency satisfactorily shown by the applicant, such relief may be sought informally, by telegram or otherwise, upon notice thereof to all parties or attorneys who appeared as aforesaid.

(e) Each petition filed under this rule shall be accompanied by three (3) additional copies thereof for the use of the Commission, and by certificate showing service upon the parties or their attorneys who appeared as aforesaid. Within five (5) days after such service any adverse party may file and serve in like manner a reply to the petition, the reply so filed to be accompanied by a like number of copies for the use of the Commission.

(f) Upon the filing of said reply or upon default thereof within the said period, the Commission will make such order with respect to the hearing of said petition, or the granting of the prayer thereof, as it shall deem just and right.

Rules of Practice in the Supreme Court of Appeals of West Virginia

RULE XIII—Rehearing*

1. How obtained.

All petitions for rehearing must be filed in the clerk's office not later than thirty days from the date of the decision complained of. The petition and the brief in support thereof shall be printed, and fifteen copies thereof filed in the office of the clerk.

2. Argument.

No oral arguments will be permitted upon an application for a rehearing. When a rehearing is allowed, the court may fix the time for reargument and resubmission, notice of which shall be given by the clerk to the attorneys of record, but in case the court fails to fix such time the clerk shall enter the case upon the docket as if it had never been heard.

3. Typewritten petition and brief.

In cases in which the record and briefs were not printed, it shall not be necessary to print a petition for rehearing; but five typewritten copies of such petition and brief in support thereof shall be filed in the clerk's office within the time provided by this rule.

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*printed in: West Virginia Code, Volume 1, The Michie Company, Appendix at 445 (1973 Replacement Volume)

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-599

APPALACHIAN POWER COMPANY,
Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

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November 28, 1975

ARBETT PRINTING COMPANY, CHARLESTON, W. VA.

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Appellee, The Public Service Commission of West Virginia, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal herein or in the alternative to affirm the judgment of the Supreme Court of Appeals of West Virginia, on the grounds that it does not present a substantial federal question and that certain federal questions sought to be reviewed were not timely or properly raised and preserved below.

NATURE OF THE CASE AND PROCEEDINGS BELOW

On February 22, 1971 Appalachian Power Company (hereinafter "Appalachian"), a public utility corporation operating in Virginia and West Virginia, filed with the Public Service Commission of West Virginia (hereinafter "Commission"), pursuant to Chapter 24, Article 2, Section 4 of the West Virginia Code, 1931, as amended[1] (hereinafter "Code"), revised tariff sheets stating increased rates and charges of approximately $9,482,000 or 10.5% annually for furnishing electric service to its retail customers throughout West Virginia to become effective April 1, 1971. Assigning the matter Case No. 7083, the Commission, pursuant to Code 24-2-4, suspended the effective date of the revised tariff sheets until July 29, 1971, when they became effective subject to refund with six (6%) percent interest under a $9,000,000 bond, and initiated an investigation into the reasonableness of the proposed rates and charges.

Evidentiary hearings were held before the Commission on April 9, July 11, July 12, July 13, October 17 and December 10, 1973, at the close of which the matter was submitted for decision, subject to the filing of briefs. The last brief, Appalachian's reply brief, was filed April 1, 1974.

On September 16, 1974 the Commission entered an order directing Appalachian, *inter alia*, to "cease and desist its practice of 'repricing' coal purchased from affiliated interests for inclusion in the Fuel Adjustment Clause."[2] Appalachian presented to the Commission its

[1]Reprinted in Appellant's "Appendix to Jurisdictional Statement" (hereinafter "Appendix") at 91-93.
[2]Appendix at 1-2.

Petition to Suspend and Reconsider the order on September 24, 1974, which was denied by Commission order entered October 18, 1974.[3] No judicial review of these two orders was sought until April 7, 1975.

On January 31, 1975 the Commission entered an order[4] which granted Appalachian an increase of $1,321,522, or about 14% of the total amount sought. On February 7, 1975 Appalachian timely filed with the Commission a Petition for Rehearing, Reopening of the Record, and Reargument pursuant to Rule 19(a) of the Commission's Rules of Practice and Procedure,[5] and evidentiary hearings along with oral argument were held on February 21 and March 7, 1975. By order entered March 21, 1975 the Commission, *inter alia*, granted Appalachian's petition to the extent of allowing a reopening of the record to receive evidence of its actual operating experience for the period January 1, 1974 through March 31, 1975.[6]

On April 7, 1975 Appalachian presented its Petition for Suspension and Appeal to the West Virginia Supreme Court of Appeals, which, after oral argument on April 22, 1975, denied said petition by order entered June 23, 1975.[7] A subsequent Motion for Reconsideration, filed July 23, 1975, was denied by that court by order entered July 29, 1975.[8] Appalachian's appeal to this Court followed.

ARGUMENT

The Commission will respond to the "questions presented" on pages 5-7 of Appalachian's Jurisdictional

[3]Appendix at 3-4.
[4]Appendix at 5-54.
[5]Appendix at 95-96.
[6]Appendix at 62-71. The reopened case is designated Case No. 7083 (Reopened).
[7]Appendix at 72-73.
[8]Appendix at 74.

Statement *seriatim;* however, the first and second questions are related and will be considered together.

I. IT IS NO VIOLATION OF CONSTITUTIONAL RIGHTS TO MAKE RATES FOR THE PERIOD JULY, 1971 THROUGH DECEMBER, 1973 BASED ON AN ADJUSTED 1970 TEST YEAR BY ORDER ENTERED IN JANUARY, 1975.

The gist of Appalachian's position is that it has a federal constitutional right under the fourteenth amendment to present evidence of actual operating results during the period July 29, 1971, when its requested rates became effective under bond subject to refund, and December 31, 1973, the end of the period during which the rates at issue were made final.

This Court will note at the outset that following entry of the Commission's January 31, 1975 order Appalachian immediately requested a rehearing which was granted. Two full days of testimony and arguments were had which confirmed "the Commission's belief that its prior orders in this case were correct."[9] Nevertheless, sufficiently substantial questions were raised as to Appalachian's financial integrity and ability to attract capital under the "debt service coverage test" that the Commission reopened the record to consider actual results for the period beginning January 1, 1974. The originally requested rates were allowed to remain effective during the period covered by the reopening.[10]

Substantially all of Appalachian's presentation during the post-decisional proceedings was directed at the effect

[9]Appendix at 63.

[10]Hearings are presently scheduled to resume in Case No. 7083 (Reopened) on January 12, 1976.

the January 31, 1975 order had on its ability to attract capital *currently* (Tr. February 21, 1975 at 12-21, 135-141); there is not the slightest suggestion in the record that the finally approved rates for 1971 through 1973 were not "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital" during that period. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). To the contrary,

> The issue of adequate debt service coverage to enable Appalachian to raise necessary new capital in 1975 from investors depends on Appalachian's income and expenses for 1974 and early 1975. Appalachian has already raised money from investors in 1971, 1972, 1973 and 1974, with what must have been adequate debt service coverage. (Tr. March 7, 1975 at 58-59).[11]

Since Appalachian was able to attract capital during 1971-1974,[12] and since the Commission has already reopened the record to assure its ability to attract capital in 1975, the constitutional tests under the fifth and fourteenth amendments have been fully met.

> . . . [I]f the rate permits the company to operate successfully and to attract capital all questions as to "just and reasonable" are at an end so far as the investor interest is concerned.

FPC v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 607 (1942) (Black, Douglas, Murphy, JJ., concurring); *accord, FPC* v. *Hope Natural Gas Co., supra,* 320 U.S. at 602.

[11]March 21, 1975 order, Appendix at 66.

[12]On February 26, 1974 Appalachian sold $50 million in bonds with a pro forma interest coverage ratio of 2.09 (Tr. March 7, 1975 at 59). It also sold $40 million in long-term bonds on April 22, 1975 and $50 million in long-term bonds on May 19, 1975.

Appalachian relies on several cases cited in its Jurisdictional Statement at 26 to support its contention that the Commission, before ordering refunds, must examine the company's actual results during the refund period. But in each of the cases cited, the respective commissions had before them in the record audited or at least proffered evidence of actual operating results which was ignored when the refunds were ordered. *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio (No. 2)*, 294 U.S. 79, 81 (1935); *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U.S. 151, 162, 163 (1934); *Williams* v. *Washington Metropolitan Area Transit Commission*, 415 F.2d 922, 945 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969); *New York Telephone Co.* v. *New York Public Service Commission*, 29 N.Y. 2d 164, 166, 272 N.E. 2d 554, 556 (1971). Here, not only has Appalachian failed to present such evidence or even to suggest that its rate of return was lower during the refund period than that ultimately allowed by the Commission, but also the Commission has agreed to reopen the record to look at actual 1974 results, allowing the full amount of the requested increase to remain in effect during the investigation.

Notably absent from Appalachian's Jurisdictional Statement is any mention of the fact that the company failed to secure any rate relief during the period in question in Virginia, where about half its retail operations are conducted (Tr. February 21, 1975 at 42-43, 47, 60). West Virginia consumers may fairly be asked to shoulder their share of the responsibility for maintaining Appalachian's financial integrity, but they cannot be expected to fulfill the responsibilities of non-jurisdictional customers.[13]

[13]Debt service coverage figures are normally developed on a total company basis. Adequate coverage thus depends on rate relief in each jurisdiction in which the company operates.

Appalachian's argument that the Commission erred in consulting its annual reports to determine debt service coverage ratios for 1972 and 1973 is ill-founded and ignores several important points. First, the selection of 1970 as a test year was made by Appalachian, not by the Commission (Tr. February 21, 1975 at 29), and it was Appalachian's failure, not the Commission's, to update the record for later periods. In other words "at the time of the 1973 hearing, Appalachian could have elected to prove its case by using 1971, 1972, or a twelve-month period ending in early 1973, or some other appropriate twelve months' period to be chosen as a representative test period. Appalachian elected not to do so."[14] Second, Appalachian not only had the opportunity to present updated evidence throughout the hearings in 1973 (or to file a whole new case), but also was virtually invited to do so at a hearing held December 10, 1974 (*see* Chairman Smith's reference to Rule 19 (a) (2) of the Commission's Rules of Practice and Procedure, Tr. December 10, 1974 at 12; *see also* Tr. February 21, 1975 at 35, 38, 45, 54, 58; Tr. March 7, 1975 at 13-18). Appalachian, under the West Virginia statute, Code 24-1-1 *et seq.*, like utilities subject to the Natural Gas Act, 15 U.S.C. §§717 *et seq.*, and the Federal Power Act, 16 U.S.C. §§824 *et seq.*, has the privilege of initially establishing rates by its own action. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Responsibility for its failure to do so cannot be placed upon the regulatory agency. Third, the debt coverage figures for 1972 cited by the Commission in its order *were* a part of the record, since the cost of capital evidence in the case was based on year-end 1972 figures (Appalachian's Exhibits 26 and 27; Tr. April

[14]Appendix at 65.

4, 1973 at 61-62); it was only because Appalachian failed to submit 1973 data that the Commission turned to the annual reports. This Court has stated, and the principle applies squarely to this case:

> No contention is made here that the information was erroneous or was misunderstood by the Commission, and no contention is made that the Company could have disproved it or explained away its effect for the purpose for which the Commission used it. The most that can be said is that the Commission in making its predictive findings went outside of the record to verify its judgment by reference to actual traffic [in this case, debt coverage] figures that became available only after the hearings closed. It does not appear that the Company was in any way prejudiced thereby, and it makes no showing that, if a rehearing were held to introduce its own reports, it would gain much by cross-examination, rebuttal, or impeachment of its own auditors or the reports they had filed. Due process, of course, requires that commissions proceed upon matters in evidence and that parties have opportunity to subject evidence to the test of cross-examination and rebuttal. But due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties. The process of keeping informed as to regulated utilities is a continuous matter with commissions. We are unwilling to say that such an incidental reference as we have here to a party's own reports, although not formally marked in evidence in the proceeding, in the absence of any showing of error or prejudice constitutes a want of due process.

Market Street Railway Co. v. *Railroad Commission of California*, 324 U.S. 548, 561-562 (1945); *accord, United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 530 (1946).

West Ohio Gas Co. v. *Public Utilities Commission of Ohio (No. 1)*, 294 U.S. 63 (1935), cited by Appalachian, is clearly distinguishable from this case on the grounds that in *West Ohio*, "opportunity did *not* exist to supplement or explain the annual reports as to the distribution of the expenses in the neighboring communities" which the commission there had relied on,[15] while here, every opportunity existed at the post-decisional hearings for Appalachian to criticize, amend or otherwise explain the annual reports data considered by the Commission. It never availed itself of the opportunity, nor has it suggested or proffered evidence of any possible prejudice.

Appalachian complains that the Commission's reliance on a stale test period, together with its refusal to reopen the record, violates its fourteenth amendment due process guarantees. However, use of a stale test period does not alone mandate a rehearing, and a refusal to grant rehearing to consider more recent data than is in the record is not necessarily error. "Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene." *United States* v. *Pierce Auto Freight Lines, Inc., supra*, 327 U.S. at 536; *accord, Radio Corp. of America* v. *United States*, 341 U.S. 412, 420 (1951).

This Court has recently reaffirmed the principle that it will decline "to require reopening of the record, except in the most extraordinary circumstances," *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974), explaining at 294-295 that:

> We appreciate the difficulties that arise when the lapse between hearing and ultimate decision

[15] 294 U.S. at 70; emphasis supplied.

is so long. . . Nevertheless, we have always been loath to require that factfinding begin anew merely because of delay in proceedings of such magnitude and complexity. To repeat what was said in *ICC* v. *Jersey City*, 322 U.S. 503, 514-515 (1944):

"Administrative consideration of evidence—particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body."

See also Northern Lines Merger Cases, 396 U.S. 491 (1970); *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 50-51 (1936); *Illinois Commerce Commission* v. *United States*, 292 U.S. 474 (1934); *United States* v. *Northern Pacific Railway Co.*, 288 U.S. 490, 494 (1933).

If an appellant has a heavy burden to convince a court that the administrative record ought to be reopened solely because of "regulatory lag," *a fortiori* that burden becomes even greater when the administrative tribunal has

already agreed to reopen for a significant portion of the lag period, as is the case here.

Were a federal constitutional right established which required in every case reopening of an administrative record of utility regulatory proceedings to receive actual results of post-test year operations, the use of the test year as a ratemaking device would be severely restricted if not totally abolished since the record would continually have to remain open to receive the latest data up to the time of the decision. Such a result would be disastrous to the regulatory process. *ICC* v. *Jersey City, supra*, 322 U.S. at 514; *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., supra*, 419 U.S. at 296.

Moreover, to reopen this record now for the 1971-1973 period would virtually "guarantee" Appalachian earnings at a specific level, a result which is contrary to constitutional principles of regulation, which are to afford an *opportunity* to earn a fair return. *Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Service Commission*, 262 U.S. 276, 291 (1923) (Separate opinion of Brandeis & Holmes, JJ.); *FPC* v. *Natural Gas Pipeline Co., supra*, 315 U.S. at 590.

The Commission in this case recognized that the length of these proceedings together with the stale record could be prejudicial to Appalachian and gave it the opportunity to "spread the facts of the lag period upon the record."[16] In addition the Commission took note of the lag period in reaching a judgment on a proper rate of return allowance by examining and considering post-test year "trends in debt and equity financing; growth of capacity and anti-

[16] Appendix at 18.

pollution facilities; inflation and other elements of risk," and a number of other factors.[17] Indeed, the Commission specifically provided that "inflationary trends are taken care of in the circumstances of this proceeding by a higher level of the rate of return allowed by the Commission than would otherwise be the case in the absence of inflation."[18]

II. NEITHER PREJUDICE NOR APPEARANCE OF IMPROPRIETY ARISES FROM STAFF COUNSEL'S ROLE IN THIS CASE.

During the post-decisional proceedings in this case Appalachian raised a question concerning the propriety of the role of the Commission's staff counsel in this case. Mr. McDonald initially appeared for Appalachian Research and Defense Fund, Inc. and the Mercer County Economic Opportunity Corporation, representing residential low income consumers (Tr. April 9, 1973 at 8-9), and participated in that phase of the hearing at which Appalachian's witnesses and the staff's allocation witness testified and were cross-examined.

Aside from cross-examination, the only evidence adduced by Mr. McDonald were five exhibits which attempted to show certain generating costs and which were sufficiently rebutted by Appalachian to lead the Commission to refer to "a failure on the part of the intervenors to come forward with adequate proof . . . ."[19]

On or about December 1, 1973, Mr. McDonald joined the legal staff of the Commission[20] and thus did not participate in the cross-examination of staff's accounting

[17]Appendix at 27-28.
[18]Appendix at 32.
[19]Appendix at 40.
[20]Appendix at 7.

witnesses, which took place on December 10, 1973. Thereafter, he, together with the Commission's general counsel and assistant general counsel, prepared the brief on behalf of the staff, which was filed March 5, 1974. Appalachian's reply brief, filed on April 1, 1974, did not mention the matter.

Appalachian first raised a question as to Mr. McDonald's "dual" role in its Petition for Rehearing filed February 7, 1975, even though Appalachian's trial counsel later stated that shortly after the staff brief was filed in 1974, he had been called by all three of the then commissioners and the assistant general counsel and "went through the thing to a considerable extent" (Tr. March 7, 1975 at 5). Counsel further stated that "as far as I personally was concerned, I was willing to accept the statements that had been made to me as something that I would consider closed" (*Id.* at 6), that "I saw nothing in the staff brief that was not pretty much down the line with the staff recommendations," and that "I was satisfied that no material harm had been done to my client" (*Id.* at 11).

At no time has Appalachian suggested that there was any breach of the attorney-client relationship in counsel's role, or that there has been a violation of the letter or spirit of the Code of Professional Responsibility or Disciplinary Rules, or that the residential intervenors' position was adverse to that of the staff so as to be prejudicial to either party, or that it has been specifically harmed by Mr. McDonald's actions. An examination of staff's brief indicates that staff counsel made little or no departure from the position of the staff's accounting, cost of capital and allocation witnesses. In fact, the brief recommended a higher rate of return than the staff cost of capital wit-

ness in order to insure proper debt service coverage for the company.

From neither *General Motors Corp.* v. *New York*, 501 F.2d 639 (2d Cir. 1974), a case which turned on the interpretation of Disciplinary Rule 9-101 (B) (which clearly is not applicable here), nor from any other case or authority cited by Appalachian can it be concluded that there was anything improper, either in substance or appearance, in law or in ethics, from Mr. McDonald's participation in this case.

III. THE COMMISSION'S ORDERS OF SEPTEMBER 16 AND OCTOBER 18, 1974 DID NOT DEPRIVE APPALACHIAN OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW; FURTHERMORE, THEY WERE FINAL ORDERS WHEN ISSUED AND THIS APPEAL IS NOT TIMELY TAKEN.

By order entered July 24, 1974, the Commission, on its own motion, initiated an investigation of the fuel adjustment clauses of electric utilities, including that of Appalachian, which investigation was docketed as Case No. 7945.[21] Appalachian or its subsidiary companies mines approximately twenty-five percent (25%) of the coal used by it for generation, and historically the cost of this "captive coal" was above the cost of market coal. Historically also, the Commission has prohibited Appalachian from recovering the excess cost of captive over market coal for fuel adjustment clause purposes. However, during 1974 when coal prices escalated, the cost of market coal rose above Appalachian's cost of captive coal and Appalachian thereupon repriced its captive coal up to market for purposes of inclusion in the fuel adjustment clause. Thus, it automatically passed along to its customers higher coal costs than it was actually incurring.

[21] *See* Appendix at 13-14.

The staff discovered these facts during its investigation and brought them to the attention of the Commission, which on September 16, 1974, issued the cease and desist order complained of.[22] The facts of this matter were fully brought out by staff testimony at the initial hearing in Case No. 7945 two days later, on September 18, 1974, and at later hearings in September, October and November, at all of which Appalachian was present and took an active part, it cross-examined the staff evidence and presented its own direct and rebuttal evidence. It has had a full and fair hearing on the question, but did not sustain its burden of proving that the practice engaged in was reasonable or lawful. Accordingly, its Petition for Rehearing was denied on October 18, 1974.[23]

Appalachian apparently complains of the Commission's considering the evidence in Case No. 7945 in this case, Case No. 7083, because the cease and desist order was entered in this docket. However, it was in this case that Appalachian's fuel adjustment clause was effective under bond and in this case that the order was properly entered. This Court has previously commented on the "legal version of the scriptural injunction against letting one's right hand know what one's left hand may be doing" by stating "the mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result." *United States* v. *Pierce Auto Freight Lines, Inc., supra,*

[22] Appendix at 1-2. The order did not require any refunds since staff's study covered only 1974 and the rates then in effect were still subject to final approval. There being no refund ordered, Appalachian was not "deprived of property" in any sense of the word.

[23] Appendix at 3-4.

327 U.S. at 529, 530. In this case at no time has Appalachian contended that it was *not* repricing its captive coal; its objections have always been either procedural or that the practice was not prohibited by the language of the fuel adjustment clause.

In any event, after the denial of Appalachian's Petition for Rehearing, Appalachian had thirty (30) days to appeal the same to the West Virginia Supreme Court of Appeals,[24] which it failed to do. It also failed to file a Notice of Appeal and Jurisdictional Statement with this Court within the time required by Rules 10, 11 and 13 of the Rules of the Supreme Court of the United States, and thus has utterly failed to preserve the question for appeal. "There being no appeal from that order within the time prescribed by law, it became binding on the company. . . ." *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio (No. 1), supra,* 294 U.S. at 66.

IV. WEST VIRGINIA CODE CHAPTER 24, ARTICLE 5, SECTION 1, IS NOT UNCONSTITUTIONAL ON ITS FACE OR AS APPLIED; FURTHERMORE, THE QUESTION IS NOT TIMELY RAISED HERE.

The first time any question of the constitutionality of Code 24-5-1 was specifically raised was in a pleading styled "Amendment and Revision of Motion for Reconsideration and Petition for Rehearing" tendered by Appalachian to the West Virginia Supreme Court of Appeals on July 29, 1975, thirty-six (36) days after that Court's order was entered denying Appalachian's petition for suspension, appeal and review of the Commission's orders and twenty-nine (29) days after Appalachian's Notice of Appeal was filed with that court on June 30,

[24]Code 24-5-1, reprinted in Appendix at 94.

1975.[25] The question was raised neither in Appalachian's initial petition for suspension, appeal and review, nor in its note of argument in support thereof, nor in oral argument before the court on April 22, 1975, and thus could not have been preserved in its Notice of Appeal.

Rule XIII of the Rules of Practice in the Supreme Court of Appeals of West Virginia[26] does not contemplate rehearing of a *denial* of review by the Supreme Court of Appeals of a Public Service Commission order, a fact which is apparent both from a reading of the rule, which calls for "reargument" and "notice" thereof to the attorneys of record, neither of which took place here, and from the court's brief order of July 29, 1975, in which the court was "of opinion not to consider" the motion "as not timely filed."[27] Not having properly presented the question to the West Virginia Supreme Court of Appeals below, Appalachian cannot now raise it in this Court. *Head* v. *New Mexico Board of Examiners,* 374 U.S. 424, 432 (1963) (footnote 12).

Even if the question had been properly raised below and preserved here, the mere fact that the statute permits discretionary rather than mandatory review of a Commission rate order does not render it constitutionally defective, even if constitutional questions are presented in the petition for suspension. *Alabama Public Service Commission* v. *Southern Railway Co.,* 341 U.S. 341 (1951).

[25]Appalachian first filed a Notice of Appeal on June 30, 1975 (Appendix at 75-77) and filed a second Notice of Appeal on October 14, 1975 (Appendix at 78-80). The latter filing was more than 90 days after the West Virginia Supreme Court of Appeals' order of June 23, 1975, and thus out of time. Its "Motion for Reconsideration" did not toll the running of the 90-day period since such a pleading is not permitted by the Rules of the Supreme Court of Appeals. See discussion at n. 26, *infra.*

[26]Appendix at 97.

[27]Appendix at 74.

While it may be true that

> When dealing with constitutional rights . . . there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it,

St. Joseph Stock Yards Co. v. *United States, supra,* 298 U.S. at 77 (Brandeis, J. concurring), it does not follow that such opportunity must amount to a virtual trial *de novo. Charleston* v. *Public Service Commission,* 110 W.Va. 245, 248, 159 S.E. 38, 40 (1931); *Preston County Light and Power Co.* v. *Public Service Commission,* 297 F. Supp. 759, 765, 766 (S.D. W.Va. 1969). A constitutional challenge to Code 24-5-1 almost identical to that made by Appalachian here has recently been presented to and rejected by a federal court. *Preston County Light and Power Co.* v. *Public Service Commission, supra* at 766. Appalachian not only had the opportunity to present all its constitutional questions to the court below, but also it availed itself of that opportunity (at least as to several of them) by its petition to the court seeking suspension, appeal and review of the Commission's orders.

CONCLUSION

For all the above reasons, Appellee, The Public Service Commission of West Virginia, urges the Court to grant its Motion to Dismiss or Affirm herein on the grounds that no substantial federal questions have been presented and that certain of the matters sought to be reviewed were not timely or properly raised and preserved below.

Respectfully submitted,

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November 28, 1975

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-599

APPALACHIAN POWER COMPANY,
Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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December 4, 1975

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Introduction

Appalachian Power Company ("Appalachian", "Company" or "Appellant") filed its Jurisdictional Statement in this proceeding on October 21, 1975. Appalachian appeals from orders of the Supreme Court of Appeals of West Virginia ("West Virginia Court") upholding certain orders of The Public Service Commission of West Virginia ("Commission" or "Appellee") establishing rates applicable to Appellant's sales of electric energy to its utility customers. On November 28, 1975, Appellee filed its Motion to Dismiss or Affirm ("Motion to Dismiss"). This Brief in Opposition demonstrates the gross misapprehensions of Appellee's Motion to Dismiss by considering each of the captioned points of Appellee's argument.

ARGUMENT

I.

Appellant's Constitutional Rights are Violated When Rates Established for the Period July 29, 1971 through December 31, 1973 Would Have Been Inadequate to Attract Capital.

Two arguments are interwoven in Point I of Appellee's Motion to Dismiss.[1] First, the Commission argues that any contention that the rates ordered by the Commission were inadequate to permit Appalachian to attract capital between July 29, 1971 and December 31, 1973 (the "Refund Period") is obviated by the fact that the Company actually attracted capital during that period. Second, the Commission argues that the Company has had the opportunity to present evidence of its actual earnings for the Refund Period and now must bear the consequences of its failure to do so. We consider these arguments separately.

A. The Constitutional Requirement that Rates Be Sufficient to Permit Appalachian to Attract Capital is Not Satisfied by the Fact that it was Able to Attract Capital on the Strength of Earnings it now is Ordered to Refund.

Appellee professes that it can ignore whether the rates which it establishes for the Refund Period are adequate for Appalachian ". . . to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its duties"[2] for the simple reason that Appalachian ". . . was able to attract capital during 1971-1974".[3]

1. Motion to Dismiss, pp. 4-12.

2. *Bluefield Water Works & Improvement Company* v. *Public Service Commission of West Virginia*, 262 U.S. 679, 693 (1923).

3. Motion to Dismiss, p. 5.

By this seemingly innocuous statement, Appellee would corrupt basic constitutional standards of reasonable utility rates which have been the keystone of public utility regulation for more than half a century. This Court has said:

> "The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties." *Bluefield Water Works & Improvement Company* v. *Public Service Commission of West Virginia*, *supra*, p. 693.

The Commission, believing the fact that Appalachian was able to attract capital between 1971 and 1974 is dispositive of the constitutional issues in this case, is now effectively saying:

> The return *subject to refund* should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate . . . to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.

Such a distortion of the basic constitutional standard requiring a fair return and rates which permit the attraction of capital by itself raises a substantial question which warrants the exercise of this Court's jurisdiction. Rates which served as the basis for the attraction of capital in 1971-1973 but which were revoked four years later and replaced by much lower rates cannot now serve to justify the constitutionality of the lower final rates.

Similarly, Appellee relies upon *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575 (1942):

> "'. . . [I]f the rate permits the company to operate successfully and to attract capital all questions as to

> "just and reasonable" are at an end so far as the investor interest is concerned.'" Motion to Dismiss, p. 5.

In fact, of course, Appellee has no knowledge of whether the rates it finally ordered would have permitted Appalachian to attract capital during the Refund Period. The thrust of Appellee's theory of regulation is that if the rate *subject to refund* permitted Appalachian to attract capital all questions as to justness and reasonableness are at an end so far as the investor interest is concerned.

The Commission's unconstitutional theory of regulation is dramatically shown by its reference to Appalachian's $50 million debt financing in February 1974. Appellee's Motion has stated that the Company's pro forma interest coverage for that financing was 2.09 times.[4] What is left unsaid by the Commission is that if the rates now ordered by the Commission had actually been in effect, pro forma interest coverage would have been less than 1.88 times and the financing could not have been legally consummated.[5]

In seeking to justify its approach the Commission erroneously contends

> ". . .there is not the slightest suggestion in the record that the finally approved rates for 1971 through 1973 were not 'sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital' during that period. *FPC*

4. Id., p. 5, n.12.

5. Even a bare minimum indenture coverage of 2.00 times annualized interest requirements or a slim additional margin would be inadequate. Two times coverage is not an appropriate level of coverage and will not maintain the financial integrity of the Company. It is only a requirement below which *no* additional long-term debt may be issued. As Jerome S. Katzin, a special partner in the investment banking firm of Kuhn, Loeb & Co., New York City, testified on March 7, 1975:

> "That is why when a company scrapes bottom with a two times coverage on existing obligations, it is in a critical and vulnerable position. Its viability as a public service corporation is endangered." (Tr. March 7, 1975, p. 34.)

> v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944)". Motion to Dismiss, p. 5.

Here Appellee conveniently ignores Appalachian's "Petition for Rehearing, Reopening of the Record, and Reargument" filed with the Commission on February 7, 1975 in which Appalachian stated:

> "In the rehearing, Appalachian intends to present evidence as to the actual results for the intervening period which will demonstrate that those results, including the entire amount collected under bond, were not inconsistent with the fundamental constitutional criteria set forth in the *Hope* case. Appalachian also will present evidence that an increase of only $1,321,522 based on 1970 test year results is confiscatory as applied to Appalachian in the intervening years." Petition for Rehearing, etc., pp. 5-6.

The requested opportunity to present such evidence at a rehearing was denied by the Commission, notwithstanding its recognition that the Company's coverage of annualized interest expense at the end of 1972 and 1973 fell below 2.00 times in the absence of any rate increase.[6] This fact alone should have attracted responsible regulatory concern as to the adequacy of a mere 1.5% increase to permit Appalachian to attract capital.

What Appalachian has sought to do in these proceedings is to obtain the opportunity to present evidence of its actual earnings during the Refund Period for the Commission's consideration.[7] That evidence, in Appalachian's view,

6. Appendix, p. 46.

7. Appellee erroneously suggests that reopening the record for the Refund Period would virtually "guarantee" Appalachian's earnings at a specific level. Motion to Dismiss, p. 11. Appalachian has never sought a guarantee. Rather the Company seeks only the opportunity to introduce evidence of its actual earnings in West Virginia during the Refund Period for the Commission's review.

The Motion to Dismiss also makes reference at page 6 to Appalachian's failure to obtain rate relief in Virginia during the period in question. The present proceeding involves a fair return to Appalachian on its utility properties in West Virginia, not in Virginia.

will confirm that the rates ordered by the Commission during the Refund Period are inconsistent with the constitutional criteria set forth in *Bluefield Water Works & Improvement Company* v. *Public Service Commission of West Virginia, supra.*

B. Appalachian Has Not Been Afforded an Opportunity To Present Evidence of Its Actual Earnings for the Refund Period.

At several points in its Motion to Dismiss, Appellee argues that Appalachian had the opportunity to present the evidence which it now seeks to present and it must now bear the consequences--presumably even to the extent of unconstitutional rates—of its failure to do so. We consider these alleged opportunities both before and after the Commission's decision of January 31, 1975.

Appellee suggests that "'. . . at the time of the 1973 hearing, Appalachian could have elected to prove its case by using 1971, 1972, or a twelve-month period ending in early 1973, or some other appropriate twelve months' period to be chosen as a representative test period.'"[8] It should be sufficient to point out that the first evidentiary hearing in this proceeding took place on April 9, 1973, more than 25 months after the Company had applied for increased rates on February 22, 1971. The Company understandably at that time was ill-disposed to extend what already had been an unconscionable administrative delay by the introduction of wholly new test-year evidence. Appellee now informs the Court and the Company that the Company was "virtually invited" to present updated evidence at a hearing held December 10, 1974, almost 46 months after it filed its application for a rate increase.[9] If the "virtual invitation" was extended on December 10, 1974,

8. Motion to Dismiss, p. 7.
9. Id., p. 7.

one is properly perplexed as to why it was so steadfastly withdrawn when urged upon the Commission two months later in the proceedings following the Commission's January 31, 1975 order.

The Commission also suggests that in the post decisional process Appalachian has failed to avail itself of the opportunity to present evidence of its actual earnings for the Refund Period.[10] It is a complete answer to point out that the Company was never afforded such an opportunity although it sought such relief in its petition for rehearing. The Commission's order of February 14, 1975 merely scheduled a hearing for oral argument, not an evidentiary hearing. Indeed the Commission has described this hearing:

> "The purpose of these post-decisional proceedings was to permit the Commission to decide whether or not, and to what extent, to grant relief as prayed for in Appalachian's two petitions for rehearing."[11]

Surely if the proceedings were, by the Commission's words, limited to deciding ". . . whether or not, and to what extent, to grant relief as prayed for . . .", Appalachian cannot now be faulted for refraining from the introduction of evidence which is the only relief it sought. It is with poor grace that the Commission states it ". . . gave [Appalachian] the opportunity to 'spread the facts of the lag period upon the record . . .'",[12] when in fact the Commission did no more than hold proceedings which considered and denied Appalachian's request for an opportunity to present such facts.

The Commission also seeks to justify its refusal to consider evidence of Appalachian's actual earnings for the Refund Period because this Court has declined "'. . . to require reopening of the record, except in the most extraordinary circumstances.' *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974). . . ."[13] The Commission's limitation of reopening

10. Id., p. 9.
11. Appendix, p. 63. (Commission Order of March 21, 1975).
12. Motion to Dismiss, p. 11.
13. Id., p. 9.

the record only for the period subsequent to January 1, 1974 is, by itself, strong evidence of the extraordinary circumstances which surrounded this case. The selection of the cut-off date January 1, 1974 is arbitrary and without any evidentiary support. At the time of its order of March 21, 1975 the Commission was just as uninformed as to the reasonableness of the Company's actual earnings for the period subsequent to January 1, 1974 as it was for the immediately preceding Refund Period.

Comparison of the reason for delays encountered in this proceeding with those in *Bowman, supra,* as shown below, confirms that Appellee's reliance on that case is inapposite.[14] This Court reasonably concluded in *Bowman* that

> "The protracted character of the proceedings resulted, not from *bureaucratic inertia,* but from the number and complexity of the issues and from the agency procedures that extended to the parties, in an effort to insure fairness in appearance as well as reality, and an opportunity to comment upon the proceedings at every stage." *Bowman, supra,* at p. 296. (Emphasis added)

There of course were no time consuming examiners' opinions in Appalachian's case in contrast to *Bowman*—the record was made before the Commission and the Commission issued the only decision. If ever there were an instance of unexplained and inexplicable bureaucratic inertia, this is it. Moreover, this is not the typical rate case situation contemplated by *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503 (1944), where future relief can be obtained by

14.

	Bowman	*Appalachian*
Hearing days	150	6
Witnesses	950	9
Transcript	23,423 pages	775 pages
Exhibits	1,989	50
Applicants	10	1
Protestants	66	5

a new rate filing. Appalachian is being ordered to pay out refunds which once paid can never be recovered.

The unconscionable bureaucratic inertia in this proceeding coupled with refunds based on the apparent unconstitutional rates ordered by the Commission renders the instant proceeding an extraordinary one which necessitates reopening the record.

II.

Staff Counsel's Dual Role has Tainted these Proceedings in Violation of Appalachian's Right to Due Process of Law.

Appellee asserts that the dual role[15] of its counsel McDonald in this proceeding has created neither prejudice nor impropriety in this case, notwithstanding the fact that before joining the Commission's staff and signing solely by himself its brief in this case, he engaged in more than 140 transcript pages of cross-examination of Appalachian's witnesses and adduced evidence on behalf of parties substantially opposed to Appalachian's requested rate increase. Clearly such conduct by Staff Counsel is inconsistent with the Commission's stated concern "to preserve the public confidence" in the Commission and the distributive justice to which it aspires.[16] The fact that Mr. McDonald did not participate in cross-examination of the staff's accounting witnesses is of no relevance; he joined the staff a few days before that cross-examination took place.

The palpable impropriety of Mr. McDonald's conduct is not excused by the statement of Appalachian's trial counsel that he personally didn't "think there was any wrong

15. Appellant objects to attorney McDonald's now assuming yet another role in this proceeding—that of counsel for the Commission. He has therefore assumed at least three different roles—counsel for two intervenors, counsel for the Commission staff, and counsel for the Commission on this appeal.

16. Appendix, p. 13.

done by Mr. McDonald", emphasizing, however, in telephone conversations he had with the then commissioners that "I had only considered it in a personal matter. . . ."[17] Whatever may have been trial counsel's personal point of view, he stated:

> "I did not think that I was making any agreement that would bind my clients and I know I made that clear to [at least one of the Commissioners] but I don't think we ever formally discussed it on the record or as something involved in the case. . . ." Transcript of March 7, 1975, pp. 11-12.

Appellee argues that the actions of Appalachian's trial counsel amounted to a waiver of Appellant's rights arising out of attorney McDonald's conduct.[18] It should be clearly understood that Appalachian's trial counsel was never authorized to waive in any way the rights or remedies available to Appalachian as a result of attorney McDonald's conduct. If trial counsel had intended to bind his client or if it reasonably could be inferred from his remarks that he had so intended, his action would have amounted to a breach of his obligations to his client under the attorney-client relationship. But in any event, trial counsel's express words quoted above demonstrate that he in no way intended to bind his client. Even if he had intended to bind his client to waive its rights, he was incapable of doing so under the law.

> "Authority to waive a substantial right of the client cannot be implied from the mere relationship of attorney and client." *Bommarito* v. *Southern Canning Co.*, 208 F. 2d 56, 60-61 (8th Cir. 1953); see also, *Himmelfarb* v. *United States*, 175 F. 2d 924, 931 (9th Cir. 1949) *cert. denied*, 338 U.S. 860 (1949).

17. Transcript of March 7, 1975, p. 12.
18. Motion to Dismiss, p. 13.

The cases are clear that counsel cannot expressly, or by laches impliedly, waive the Canon standards *because* of the public interest involved, *because* of the Court's responsibilities in these matters, and *because* a client's substantial legal rights are involved. *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 574 (2d Cir. 1973); *Empire Linotype School, Inc.* v. *United States*, 143 F. Supp. 627, 631 (S.D.N.Y. 1956); and *United States* v. *Standard Oil Company*, 136 F. Supp. 345, 351 n. 6 (S.D.N.Y. 1955).

The fact that Appalachian first raised the issue of Mr. McDonald's dual role by petition filed February 7, 1975 is of no significance because it has been held that "[t]he Court's duty and power to regulate the conduct of attorneys practicing before it, in accordance with the [American Bar Association] Canons, cannot be defeated by the laches of a private party or complainant." *Empire Linotype School, Inc.* v. *United States, supra*, p. 631.

Though Appalachian has repeatedly alluded to the impropriety of Mr. McDonald's conduct in this case, Appellee claims that

> "At no time has Appalachian suggested that there was any breach of the attorney-client relationship in counsel's role, or that there has been a violation of the letter or spirit of the Code of Professional Responsibility or Disciplinary Rules. . . ." Motion to Dismiss, p. 13.

The record before this court should reflect that, on the contrary, Appalachian stated in its April 7, 1975 petition to the West Virginia Court for suspension of the Commission's orders in question that ". . . Appalachian believes [the conduct of Mr. McDonald in this case] is in contravention of minimum standards applicable to members of the Bar."[19]

19. Petition of April 7, 1975, p. 7.

Staff Counsel for the Commission, who participated in the proceeding before the Commission on behalf of private clients, should not be permitted to take on substantial responsibilities for the Commission in these same proceedings upon becoming a Commission employee. Though the measure of prejudice imposed on the proceeding cannot be quantified, at the very least, such conduct creates the appearance of impropriety in violation of Appalachian's right to procedural due process of law.

III.

The Commission's Interim Order of September 16, 1974 and Denial of Rehearing October 18, 1974 Deprived Appalachian of its Property without Due Process of Law and this Appeal is Timely Taken.

The Commission's September 16, 1974 order directed Appalachian to cease and desist immediately ". . . its practice of 'repricing' coal purchased from affiliated interests for inclusion in the Fuel Adjustment Clause. . . ."[20] The Commission's October 18, 1974 order denied Appalachian's Petition for Suspension and Reconsideration.

Though Appalachian clearly stated that its objection to these orders rests on failure to afford prior notice and

20. Appendix, p. 1. The Commission's Motion to Dismiss recites that the Company "repriced its captive coal up to market"; that the staff had "discovered these facts during its investigations"; and alleges that Appalachian "did not sustain its burden of proving that the practice engaged in was reasonable or lawful." Motion to Dismiss, pp. 14-15. The term "repricing" in this context cannotes wrongdoing; a staff discovery made "during investigation" suggests cover-up and illegality; and the allegation made that the Company had not sustained its burden of proving the lawfulness of its practice expresses a Commission attitude that what the Company had been doing was unlawful. Quite the contrary, the Company engaged in no unlawful practice: it make no cover-up; it was not involved in any wrongdoing. The Company followed exactly what the Fuel Adjustment Clause in its filed tariff required; it made monthly reports to the Commission; and it based the price of coal from affiliated sources "solely on purchases from non-affiliated mines", as its Fuel Adjustment Clause required.

opportunity to be heard,[21] the Motion to Dismiss does not contest the fact that the Commission's cease and desist order was issued without such prior notice or opportunity to be heard. Instead, Appellee contends that Appalachian was not deprived of property by the order because no refunds were required. Such a conclusion is utterly untenable because the order reduced the amount of the Company's recovery through its duly filed Fuel Adjustment Clause. A clear deprivation of property without due process of law was the inevitable result.

Appellee asserts that Appalachian failed to take timely appeal from the September 16, 1974 order and is therefore bound by the Commission's action.[22] This presumes the September 16, 1974 order (which was to continue in effect ". . . until further order of the Commission."[23]) was a final and appealable order. But, the Commission has itself characterized that mandate as an "interim modification of Appalachian's fuel adjustment clause"[24], and, on October 18, 1974, it characterized the September 16 order as stating ". . . that further investigation and review will be made of Applicant's practice of 'repricing' coal purchased from affiliated interests. . . ."[25] The denial of rehearing on October 18, 1974 with respect to the "interim modification" can have no effect upon the non-appealability of the September 16, 1974 order. Only by the Commission's order of March 21, 1975 did the issue become ripe for appeal; and it has been duly preserved.

21. Jurisdictional Statement, p. 36.
22. Motion to Dismiss, p. 16.
23. Appendix, p. 2.
24. Appendix, p. 57 (Commission's order of February 14, 1975).
25. Id., p. 3.

IV.

West Virginia Code, Chapter 24, Article 5, Section 1, is Repugnant to the Constitution of the United States as Applied herein; The Question was Timely Raised.

Appellee mistakenly asserts that Appalachian failed to raise in a timely manner the question of the constitutionality of West Virginia Code, Chapter 24, Article 5, Section 1. To the contrary, Appalachian stated in its Brief in Support of Motion for Reconsideration . . . and Petition for Rehearing filed with the West Virginia Court on July 23, 1975:

> "If this Court construes West Virginia Code § 24-5-1 to provide for review of orders of the Public Service Commission only as a matter of discretion under the facts of this case, then Appalachian believes that the statute so construed is in violation of the Due Process Clause of the United States Constitution." Petitioner's Brief in Support of Motion for Reconsideration . . . and Petition for Rehearing dated July 23, 1975, pp. 9-10.

The motion and petition and the supporting brief were timely filed within thirty days after the June 23, 1975 decision complained of in accordance with Rule XIII—Rehearing of the West Virginia Court's Rules of Practice.[26]

Moreover, Appalachian properly preserved the question through filing on October 14, 1975 the Notice of Appeal by which this appeal is intended to be taken. The filing was made within 90 days of the West Virginia Court's order denying Appalachian's motion for reconsideration and petition for rehearing, and it is clearly settled that when a request for rehearing is timely made, the time within which

26. Appendix, p. 97.

the Notice of Appeal must be filed does not commence until the finality of the order appealed from is established by denial of the request. *Department of Banking of Nebraska* v. *Pink*, 317 U.S. 264, 266 (1942).

Appellee further suggests that rehearing of the West Virginia Court's June 23, 1975 order under its Rule XIII—Rehearing is not available upon an order *denying* review by that Court and that the request for such rehearing did not suspend the finality of the June 23, 1975 order. Appellee's theory for this result is based on the novel supposition, made without any cited authority, that a request for rehearing of the West Virginia Court's *denial* of a petition for review of the Commission's order is not within the purview of the West Virginia Court's Rule XIII, though Appellee implies that request for rehearing on a *grant* of such petition for review would be proper. Certainly the fact that neither "reargument" nor "notice" thereof occurred in the present case is irrelevant because such events are provided by Rule XIII only where "rehearing is allowed", whereas in the present case rehearing was denied. Accordingly, the only reasonable interpretation is that the timely request for rehearing suspended the finality of the West Virginia Court's June 23, 1975 order until denial of the request by its order of July 29, 1975, and the Notice of Appeal filed October 14, 1975 (less than 90 days after July 29, 1975) properly preserved for this appeal the issue of the unconstitutionality of West Virginia Code, Chapter 24, Article 5, Section 1.

Appellee's further contentions respecting this question are not supported by the authority cited. Citing *Alabama Public Service Commission* v. *Southern Ry.*, 341 U.S. 341 (1951), Appellee states that

> ". . . the mere fact that the statute permits discretionary rather than mandatory review of a Commission rate order does not render it constitutionally defective. . .,"[27]

27. Motion to Dismiss, p. 17.

yet that case involved a statute where ". . . appeal from any final order of the Commission . . . [existed] as a matter of right."[28] Similarly, citing *Preston County Light and Power Company* v. *Public Service Commission of West Virginia*, 297 F. Supp. 759, 766 (S.D. W. Va. 1969), Appellee claims that a challenge to West Virginia Code, Chapter 24, Article 5, Section 1, has been "rejected by a federal court,"[29] yet that case was denied on the basis of the Johnson Act,[30] a statute which is inapplicable to this case.

West Virginia Code, Chapter 24, Article 5, Section 1, as applied in this case to deny Appalachian any forum for presenting its constitutional challenges to the instant rates promulgated by the Commission is repugnant to the Constitution of the United States and therefore void.

Conclusion

The Commission's January 31, 1975 order already has had an extremely severe impact on Appalachian's ability to finance. An immediate result of the order was a reduction in the Company's first mortgage bond rating from A to Baa,[31] restricting access to the capital markets and substantially increasing the Company's cost of capital. The Company's financing alternatives, its ability to sell its securities, and hence its financial integrity and ability to continue to render satisfactory utility service have been, and continue to be, seriously endangered by the Commission's order.

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28. *Alabama Public Service Commission* v. *Southern Ry., supra*, p. 348.

29. Motion to Dismiss, p. 18.

30. 28 U.S.C. § 1342. The Johnson Act severely limits the jurisdiction of Federal District Courts to review orders "affecting rates chargeable by a public utility and made by a State administrative agency. . . ."

31. Jurisdictional Statement, p. 8, n.5.

Although the "capital attraction" issue in this proceeding focuses upon those provisions of the January 31 order which would require the Company to refund more than $23 million without affording any opportunity to present evidence of the actual results of the Company's operations and its ability to attract capital during 1971-1973, Appalachian's *present* ability to finance should not be further jeopardized by denying it even the right to demonstrate the confiscatory nature of the rates finally imposed on the Company by the Commission in 1975 applicable to the years 1971-1973. Current investor perception of the Company's securities surely has been marred by the Commission's order and refusal to reopen the record on the years 1971-1973.

This Court should deny Appellee's Motion to Dismiss, and note probable jurisdiction, or, in the alternative, vacate the final orders appealed from and remand the case for the taking of evidence of Appellant's actual results from July 29, 1971 through December 31, 1973 and for decision thereon; and this Court should grant Appellant such further relief as it may deem appropriate.

Respectfully submitted,

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December 4, 1975